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CRIMINAL JURISDICTION OVER
VISITING ARMED FORCES

by
Roland J. Stanger



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FOREWORD

Since the Naval War College was founded in 1884, the study of International Law has been an important part of the curriculum. From 1894 to 1900, certain lectures given on International Law and the situations studied were compiled and printed, but with a very limited distribution. Commencing in 1901, however, the first formal volume of the Naval War College's "Blue Book" series was published.

This book represents the fifty-second volume in the series as numbered for cataloging and reference purposes. This present volume is written by Professor Roland J. Stanger of the College of Law, The Ohio State University, who was the occupant of the Chair of International Law at the Naval War College during the 1958-1959 school term. This volume by Professor Stanger represents a valuable and complete compilation of reference material on Status of Forces Agreements, with particular emphasis on the field of criminal jurisdiction.

The opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy or of the Naval War College.

C. L. MELSON
Vice Admiral, U.S. Navy
President, Naval War College

PREFACE

The American people seemingly now recognize that when a member of our armed forces stationed in a foreign country is accused of crime, there are circumstances in which it is both proper and appropriate that he be tried by a court of the host country. Countries in which our troops are stationed seemingly likewise recognize that there are circumstances in which it is proper and appropriate that the accused be tried by an American court-martial rather than by a court of the host country. Drawing the line has not been, and will never be, easy. The purpose of this book is twofold. One is to point out where the not always bright line is drawn in the various arrangements which now govern the status of our forces abroad, and the considerations which have led to those arrangements. The other is to suggest the possible bases on which those arrangements could be refined the better to accommodate the conflicting interests at stake and to minimize the possibility of international misunderstanding.

I wish to thank Vice Admirals S. H. Ingersoll, B. L. Austin, and C. L. Melson, Presidents of the Naval War College, and their staffs, for their help and cooperation. I acknowledge also a debt of gratitude to Professor Joseph M. Snee, S. J. of Georgetown University Law Center for his generosity in opening his invaluable files on status of forces problems to me; and to Professors John P. Dawson of the Harvard Law School and Richard A. Falk of Princeton University for reading the manuscript and for their helpful suggestions. A special debt is likewise owed to the Office of the Judge Advocate General, Department of the Navy, particularly the International Law Division, for their assistance in the preparation of this manuscript. For what is here offered I accept full responsibility.

ROLAND J. STANGER
Columbus, Ohio
March 9, 1965

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INTRODUCTION

To meet world-wide threats of aggression, obligations between Free World nations presently require that their Armed Forces, together with civilian employees of these forces, and military and civilian dependents, be stationed in foreign territory. In fulfillment of its treaty responsibilities, the United States has about 633,000 members of its Armed Forces, accompanied by some 25,000 civilian employees, and almost one-half million dependents, presently stationed in more than sixty foreign states. With such large numbers of people involved, it is inevitable that some individuals in these groups will become involved in matters relating to the criminal jurisdiction of receiving states.

In particular situations and for various reasons, receiving states may want to prosecute foreign nationals, including military personnel, who allegedly have violated their laws. At the same time, and for other reasons, sending states may resist these efforts by receiving states to assert jurisdiction. Since misunderstanding and tension can develop to varying degrees in this environment, any appraisal of what has come to be known as the Status of Forces problem should be in terms of the means by which friction can be minimized.

The Status of Forces problem is only one area of criminal jurisdiction that produces international misunderstanding. Jurisdiction over crime has always involved such primary interests as the requirement for public order and the rights of the individual. In situations in which more than one state has a significant interest in an allegedly criminal act the problem can become acute.

When the alleged offender is a member of the Armed Forces of a sending state, there can be a potential for serious misunderstanding. In a given set of circumstances, the sending state may quite properly feel that its military security interests are threatened if the receiving state claims jurisdiction over a member of its Armed Forces. At the same time, the receiving state may take the position that its public order is peculiarly

threatened, and that its own interests require an effective assertion of jurisdiction.

In an examination of the jurisdictional aspects of these problems, it should always be borne in mind that the issue is that of jurisdiction, not the guilt or innocence of the accused. If competing jurisdictional claims exist, a decision on this issue determines only which state will try the accused.

Since a balanced view must be maintained, it is useful to consider those situations involving jurisdiction over crimes in which states have reached an acceptable accommodation of conflicting interests. The framework of ideas so developed may be useful in at least two ways: (a) To point up various determinative considerations which must be taken into account; and (b) to suggest permissible solutions which will accommodate the interests of both sending and receiving states.

This study will begin with a relatively brief discussion of the bases of jurisdiction, of immunity from jurisdiction and of the allocation of jurisdiction over the crews of merchant ships and of warships. There will follow a survey of the varied circumstances in which armed forces have been stationed in friendly foreign states, the interests of the sending and receiving states which have led them to claim jurisdiction over such forces, the rules of international law which are said to have been established in this area, and the manner in which jurisdiction has in fact been allocated between the sending and receiving states. Particular emphasis will be placed on the international agreements now governing the status of United States forces abroad. Since the most important of these is the NATO Agreement, the arrangements it establishes will be analyzed in detail and compared with those established in other agreements. From this comparison, a pattern of practices emerges with respect to the allocation of jurisdiction over visiting forces.

CHAPTER I

JURISDICTION

In the vast majority of cases, crimes take place wholly in one state, involve only citizens of that state and have no discernible impact beyond that state's borders. There is nothing new, however, in what may be called multinational crime. In such instances, the acts constituting a crime may take place in more than one state, or their impact may be felt outside the state in which they occur. Concretely, such crimes may range from a traffic violation to murder, from smuggling to counterfeiting to high treason. The accused, or the victim, may be a member of another state's armed forces, a tourist, a merchant seaman, a diplomat, or a foreign business man negotiating a single transaction. The accused or the victim may be a casual visitor or, on the contrary, may be residing more or less permanently in the country. Crime, in brief, involves a whole complex of relationships. Any one or more of its facets may so concern a state as to prompt it to assert jurisdiction, or to protest the assertion of jurisdiction by another state.

In situations so complex, it would be surprising if simple rules had been or could be formulated which made possible the ready, frictionless resolution of controversies; especially since supranational institutions empowered authoritatively to formulate rules circumscribing the competence of states are largely lacking.¹ Traditional analysis² of the problem of criminal jurisdiction

¹ See, generally, Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," 32 *Temp. L. Q.* 295 (1959).

² See Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 A.J.I.L., Supp., pt. II, 439 (1935) [hereinafter cited as Harvard Research, *Crime*]; and the American Law Institute, Restatement, *The Foreign Relations Law of the United States*, (Proposed Official Draft, May 3, 1962), [hereinafter cited as Restatement, *Foreign Relations Law*]. It is not suggested that these careful analyses do not adequately recognize the many qualifications and limitations on the recognized bases of criminal jurisdiction. It is submitted, however, that any approach in terms of such principles is necessarily too rigid and hence to a degree misleading.

nevertheless suggests that such rules exist in terms of the territorial principle, the nationality principle, etc. This analysis has the virtue of accenting the power of a state to assert jurisdiction in a wide variety of circumstances; and since the specific bases of jurisdiction are sufficiently vague, a state may shape its claims to bring the great majority of cases under one or the other principle. The added scope afforded by the position taken in the *Lotus* case,³ that a state's competence is limited only by prohibitive rules, merely emphasizes the almost plenary power of a state to assert the applicability of its criminal law.

Confronted with the firmly established rule that no state enforces the criminal law of another state,⁴ states may try to extend the reach of their law, in part because they must either apply their own law or forego prosecution altogether.⁵ They have not, however, characteristically claimed the full range of competence which the *Lotus* case views as tolerable. The fact that the recognized bases of jurisdiction are not mutually exclusive seemingly invites controversy, but such has not been common. Rather, self-restraint on the part of states, prompted by considerations of comity, feasibility, and fairness, has resulted in a tolerable accommodation of the conflicting interests involved. The Restatement (Second) *Conflict of Laws* summarizes the situation realistically with this statement: "A state has legislative jurisdiction if its contacts with a person, thing or occurrence are sufficient to make it reasonable to apply that state's law to create or affect legal interests."⁶

TERRITORIAL JURISDICTION

Since the emergence of the territorial state, states have claimed criminal jurisdiction with respect to conduct taking place in their territory. Every state exercises jurisdiction on this basis and all states recognize that other states may do so, subject only to cer-

³ Case of the S.S. *Lotus*, P.C.I.J., ser. A, No. 10 (1927).

⁴ Harvard Research, *Crime*, *supra*, note 2, at 439. The rule may also serve to obscure the degree to which states are prepared to defer to foreign law since, if the offense is not extraditable, a state can evidence such willingness to defer only by releasing the accused.

⁵ Trautman, Appendix to Chapter 11 of Brewster, *Antitrust and American Business Abroad*, 339, (1958). Acquiescing in a request for extradition may be a third alternative.

⁶ Restatement (Second) *Conflict of Laws*, sec. 43 e (Tent. Draft No. 3, 1956).

tain narrow limitations.⁷ It is implicit that jurisdiction so based extends to foreigners. "When the nationals of one state enter the territory of another state, whether for business or pleasure, they subject themselves to the laws of the latter state and, although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home state, so long as such laws and rules are not below the standard generally obtaining in well-ordered states and are administered fairly and impartially, neither the aliens nor their governments have a right to complain."⁸

The soundness of this approach becomes evident when one considers the consequences should any rule of international law make all aliens immune from the local law, so that any alien a state admitted to its territory could obey or disobey its laws at his pleasure.⁹ These consequences have been given laboratory demon-

⁷ "It is universally recognized that States are competent, in general, to punish all crimes committed within their territory. * * * The general principle of territorial competence is too well-established to require an extended discussion of authorities. The principle is basic, of course, in Anglo-American jurisprudence. It is incorporated in all modern codes." Harvard Research, *Crime, supra*, note 2, at 480, 481; Article 17, Restatement, *Foreign Relations Law*, p. 49.

But "[T]he original conception of law was personal, and it was only the rise of the modern territorial state that subjected aliens—even when they happened to be resident in a state not their own—to the law of that state. International law did not start as the law of a society of states each of omniscient jurisdiction, but of states possessing a personal jurisdiction over their own nationals and later acquiring a territorial jurisdiction over resident non-nationals." Brierly, *The Basis of Obligation in International Law*, 144 (1958).

⁸ 2 Hackworth, *International Law*, 84 (1941). See also Moore, dissenting opinion in the *Lotus* case, *supra*, note 3, at 69; Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 1925 *Brit. Yb. Int'l. L.* 45.

⁹ "When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction

stration in the countries that have accorded extraterritorial rights to particular classes of foreigners.

Some have found justification for the territorial principle in the concept of sovereignty. Others have pointed out that sovereignty is much too vague a concept to serve as an effective tool in making the subtle differentiations called for in delimiting criminal jurisdiction.¹⁰ There are, nevertheless, the soundest of policy reasons for recognizing the primary jurisdiction of the state in which the acts occurred as the norm. The allocation of competence in the world is predominantly in terms of geography, and political and social institutions are shaped largely by the concept of the territorial state.

Maintaining public order within its borders is a necessary function of the modern state. More broadly, the state is recognized as entitled to determine the kind of social and economic order which is to prevail in its territory, in keeping with its responsibility to promote the welfare of its citizens.¹¹ Criminal law, both in what it prohibits and what it permits, is one of the means of shaping that order. The competence of the territorial state to proscribe and its privilege to permit certain activities, by aliens

of the country in which they are found, and no one motive for requiring it." Marshall, C.J., in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 144 (1812). It is to be noted that when this was written, Americans already enjoyed extraterritorial rights in some countries. See p. 15 et seq. *infra*.

¹⁰ "So long as we know no more of international sovereignty than that it is equivalent to independence, it will be vain to try, often as the attempt has been made, to deduce the answers to these questions from sovereignty itself; it is precisely in reconciling the independence of different authorities, in the circumstances in which the territories, ships and persons subject to them may be placed, that the difficulties arise." 1 Westlake, *International Law*, 237 (1904). Brierly observed that "* * * [S]overeignty is merely a term that we find convenient when we wish to refer collectively to a number of particular powers that states have traditionally claimed for themselves the right to exercise." Brierly, *op. cit. supra*, note 7, at 350.

¹¹ "There is general agreement that a state is primarily interested in events that affect its own safety, public order, and the integrity of its social system; that is, the distribution of values among those who, by virtue of citizenship or residence, identify themselves with a particular community and seek the protection of its laws." Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 *Yale L.J.* 1087, 1133 (1956). See also Donnedieu de Vabres, *Les Principes Modernes de Droit Penal International* 11-13 (1928).

as well as its nationals, should be respected. This is so commonly understood that both look first to the territorial state for protection of their persons and property and for the rules by which they govern their own conduct. Respect for law and order may well require that all who commit like offenses in the same place be tried in the same courts under the same law.¹² Again, elementary notions of fairness—and of personal liberty—may be violated if an individual is held subject to the criminal law of any state other than that which he is in, even a state of which he is a national.¹³ Conversely, charges of unfairness toward an alien on grounds of lack of notice are in part met by the consideration that, since he was aware that he was subject to the local law, he should have informed himself of its prohibitions. Lack of sympathy for, or understanding of, local attitudes reflected in local law may affect the alien's conduct, but should not be confused with lack of notice.

Anglo-American adherence to the territorial principle apparently has its roots in considerations of purely domestic law stemming from the early status of jurors as witnesses as well as triers of issues of fact.¹⁴ At common law, venue was laid at the place of the crime¹⁵ and the right to be tried where the crime was committed is still a fundamental protection accorded the accused.¹⁶ By the same token, perhaps the most persuasive argument for the territorial principle is that trial at the place of the crime is essential to the effective administration of justice. This argument is based on such factors as investigation, availability and attendance of witnesses, and production of evidence. All of the considerations which bear upon venue in domestic law are pertinent. Trial

¹² *Westchester County v. Ranollo*, 187 Misc. 777, 67 N.Y. Supp. 2d 31, (City Ct., New Rochelle, 1946), 41 A.J.I.L. 690 (1947).

¹³ It seems overdramatic to refer to "[T]he system of tying the entire criminal law of a country around the neck of a subject, and of making him liable to its operation in whatever part of the world he may be * * *." Lewis, *Foreign Jurisdiction and the Extradition of Criminals* 29 (1859). But see *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); Bar, *International Law*, 631, 662 (Gillespie transl., 1883).

¹⁴ Cook, "The Logical and Legal Bases of the Conflict of Law," *Selected Readings on Conflict of Laws*, 71, 74 (1956); Berge, "Jurisdiction and the Territorial Principle," 30 *Mich. L. Rev.* 238, 239-240 (1931).

¹⁵ "At common law venue was laid at the 'place' of the crime and * * * venue merged into jurisdiction and joined forces with sovereignty." Katzenbach, *op. cit. supra*, note 11, at 1141.

¹⁶ *Travis v. United States*, 364 U.S. 631 (1961).

at a distance may, moreover, cause delays and thus introduce another element of unfairness to the accused.¹⁷

These considerations emphasize the legitimate concern of the territorial state with activities taking place within its territory and suggest that its primary competence to apply its criminal law should be respected. States are moved to exercise jurisdiction over acts taking place within their territory not primarily because they take place there—though that may be the rationalization—but because, since they take place there, they affect the primary interests of the state or of its citizens.

This is far from saying, however, that only the territorial state can have such interest and competence, or even that in every case they are primary. A state is too concerned with the activities abroad of its private citizens, its representatives and its armed forces; with its foreign trade and commerce and the foreign investments of its citizens; with the flow of the means of payment; with the gathering and dissemination of information; with, in short, everything which affects its position in the world, not to be vitally interested in many matters occurring beyond its borders.¹⁸ Geographical isolation, which may have been a factor in the traditional Anglo-American adherence to the territorial principle, no longer protects a state from the impact of acts outside its borders. The result has been, and is, increasing pressure by individual states to extend the application of their law to activities taking place abroad.¹⁹

¹⁷ Donnedieu de Vabres, *op. cit. supra*, note 11, at 11. 1 *Pitt Cobbett's Cases on International Law* 44, (5th ed., Grey, 1931). Lewis, *Foreign Jurisdiction and Extradition of Criminals* 30 (1859).

¹⁸ "Within the world community, methods of policy prescription and application are territorially organized within a framework of separate sovereignties. But the values that states seek to achieve jointly and severally as well as the means of achievement are not so easily related to geography. Policy is conceived in functional terms, and the basis of power—persons and wealth—move across state lines with relative ease." Katzenbach, *op. cit. supra*, note 11, at 1151, note 11, at 1095.

¹⁹ "In earlier days, when there may have been an attempt to delimit transactions, to assign them to exclusive regulating jurisdictions, and, at the same time, when there was perhaps less felt need and less energy for the enforcement of regulations beyond geographical boundaries, *Locus regit actum* was a perfectly rational working principle, both as an explanation of the assertion of jurisdiction and as a restraint on the undue extension of jurisdiction." Trautman, *op. cit. supra*, note 5, at 315.

In reviewing the context in which the status of forces problem arises, it is useful to consider the efforts of states to extend the reach of their laws and to resist such efforts by other states. It should be borne in mind, however, that the claim of a receiving state to try a member of a visiting armed force involves no effort to extend the reach of its law; its claim is rooted in the territorial principle in its simplest, geographical sense. The sending state resists invocation of the territorial principle because it believes other factors outweigh those which reinforce the territorial principle and claims the right to apply its law extraterritorially to its troops.

States moved to extend the range of application of their criminal law have asserted jurisdiction that is in substance extraterritorial, without acknowledging its essentially extraterritorial character, by expansion of the territorial principle. It has been pointed out that improvements in transportation and communication facilities and the increasing complexity of criminal acts required and justified such expansion. Courts and legislatures have responded; courts have interpreted statutes punishing crimes committed in the state to include situations in which the crime took place only partly within the state, and legislatures have participated in expanding the principle through statutes broadening the definitions of specific crimes, i.e., larceny, to include possession within the state of goods stolen outside. Theories regarding the nature of and locus of crime, e.g., the French principle of *indivisibilité* and *connexité*, have been formulated or developed in aid of the process. Jurisdiction on the objective territorial principle relating to crimes begun outside but consummated within a state has been more widely asserted than on the subjective principle relating to crimes begun within a state but consummated outside. This is understandable because the former centers on the impact of criminal acts, the latter on the intention with which acts are undertaken. Assertions based on either principle are, however, recognized as valid. Generally, a criminal engaged in exporting crime may be called to account in either the state from or to which he exports. Jurisdiction has been extended to cover participation within a state in a crime committed abroad, even though participation is, in domestic law, frequently treated as a separate crime. Jurisdiction has even been asserted with respect

to an unsuccessful attempt outside a state to commit a crime within that state.²⁰

The effort of states to extend the application of their laws to situations in which the territorial link is so tenuous suggests a need to protect the state and its citizens, regardless of where the acts prejudicing their interests take place. The motivation is sufficiently compelling to lead states to assert jurisdiction which is explicitly extraterritorial. The contrary effort to enshrine the territorial principle as the exclusive basis of jurisdiction never prevailed.²¹

Under the traditional analysis, assertions of extraterritorial jurisdiction are rationalized under the headings of the nationality, protective, passive personality and universality principles—to list them in the declining order of their acceptability. Such an analysis of problems of extraterritorial jurisdiction in terms of these principles can be most misleading for it suggests that the only relevant inquiry is whether there is a discernible link to the state asserting jurisdiction. An inquiry so limited fails to take into account that a balancing of the interests of states, not the interest of a single state, should determine the propriety of an assertion of jurisdiction. This type of analysis also fails to place proper emphasis on the self-restraint which states in fact exercise in asserting extraterritorial jurisdiction.²²

²⁰ Articles 17 and 18, Restatement, *Foreign Relations Law*, pp. 49, 52. Restatement (Second), *Conflict of Laws*, sec. 43 f, comment h (Tent. Draft No. 3, 1956); Harvard Research, *Crime*, *supra*, note 2, at 480–508. 29 A.J.I.L., Supp., pt. II, 480–508; Trautman, *op. cit. supra*, note 5, at 315–321; Katzenbach, *op. cit. supra*, note 11, at 1142.

²¹ 1 Hyde, *International Law* 726 (2d ed. 1947); 2 Moore, *International Law* 225 (1906).

The prevailing view was stated in the *Lotus* case, *supra*, note 3, at 20: “Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.”

²² Mr. Justice Jackson, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), involving the reach of the Jones Act, put the point admirably, saying, at 581 *et seq.*:

“[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact

The link between a state and an isolated occurrence may be so insubstantial as in itself to raise a due process or denial of justice question. The link may, however, be inherently adequate and the assertion of jurisdiction nevertheless objectionable because of the conflicting interests of other states. A major consideration is whether the conduct is offensive to the law of all the states involved, or is permitted, protected, or even compelled by the law of the state in which the act or acts occurred or of which the accused is a national, or the like. It is one thing for Belgium to acquiesce in the United States' trying an American sailor for murder committed on an American ship at anchor in a port on the Congo River 250 miles from the sea,²³ and another for England to acquiesce when an American court orders a British corporation to reconvey patents to an American corporation in contradiction of a contractual obligation to a second British corporation.²⁴ It is one thing for Brazil to acquiesce in the United States' trying an American for defrauding a United States

to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts * * * have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

"International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. * * * [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

²³ *United States v. Flores*, 289 U.S. 137 (1933).

²⁴ *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951); 105 F. Supp. 215 (S.D.N.Y. 1952); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* [1952], 2 All E.R. 780; *British Nylon Spinners v. I.C.I. Ltd.* [1954], 3 All E.R. 88.

Government corporation in Brazil,²⁵ another for, say, England to acquiesce in prosecution by some dictator of a British publisher for criticizing the dictator in a British newspaper. A valid generalization may be made that, for the reasons already suggested, the state in which the activity occurs has the primary interest, but at best it is only a generalization. Unhappily it is in precisely those instances in which their policies diverge the most that one state is most likely to seek to extend the application of its law and another state to resist that extension. Efforts of the United States to extend the reach of the Volstead Act²⁶ are illustrative. A nice question, more of policy than law, is raised, how far a state should seek to implement its own policies by extending the reach of its criminal law against the vigorous opposition of a state with contrary views. Fairness, in terms of notice, should be a factor. Here again, a generalization may be made that the fairness of an assertion of extraterritorial jurisdiction varies, depending on whether the conduct is or is not commonly regarded as criminal. Perhaps another generalization can be made that trial at the place where the acts occurred is more feasible, and hence likely to be fairer, than trial elsewhere.

The right to assert extraterritorial jurisdiction over nationals for their acts abroad is often broadly affirmed,²⁷ but is used only

²⁵ "Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance." *United States v. Bowman*, 260 U.S. 94, 102 (1922).

²⁶ *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923).

²⁷ Article 30, Restatement, *Foreign Relations Law*, p. 87. Restatement (Second), *Conflict of Laws*, sec. 43 f(1)(c). (Tent. Draft No. 3, 1956); Harvard Research, *Crime*, *supra*, note 2, at 519.

Mr. Justice Holmes, in *American Banana Co. v. United Fruit Company*, 213 U.S. 347 (1909), indicated at least antipathy towards the exercise of jurisdiction based on nationality, but the issue was the interpretation of a statute rather than the reach of Congressional power, and the case was further complicated because the action complained of was that of the Costa Rican government. After noting that governments, including the British and American, had exercised jurisdiction so based, Mr. Justice Holmes said at p. 346: "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign,

sparingly, particularly by those states in the common law tradition.²⁸ It can be rationalized as derived from allegiance, as a kind of *quid pro quo* for the protection accorded citizens and activities abroad. The rationalization is more convincing where the offense is against the state itself, e.g., treason, than where it is against an individual, e.g., murder or robbery.²⁹ Cases of the latter type in which jurisdiction is asserted when nationality is the only link are relatively rare. Usually, there is a discernible impact on or activity in the state's territory, or the requirement may be imposed that the offense be against a fellow national. Moreover, a willingness to defer to foreign law is frequently manifested, either by a requirement that the offense be punishable also by the *lex loci delicti*, or by recognizing the primary right of the territorial state to prosecute.³⁰ The nationality principle may, on the other hand, because of its respectability, be invoked in situations in which it is not strictly applicable, as in the case of seamen not nationals of the flag state or alien members of an armed force abroad. One can, of course, speak of assimilated nationality, in terms of temporary allegiance and a correlative claim to the state's protection abroad. The real justification and motivation is,

contrary to the comity of nations, which the other state concerned justly might resent." See *Steele v. Bulova Watch Co., Inc.*, 344 U.S. 280 (1952).

Any doubt as to the American position with respect to the nationality principle was long since resolved. See *United States v. Bowman*, 260 U.S. 94 (1922); *Blackmer v. United States*, 284 U.S. 421 (1932); *Skiriotes v. Florida*, 313 U.S. 69 (1941).

²⁸ Delaume, "Jurisdiction over Crimes Committed Abroad: French and American Law," 21 *Geo. Wash. L. Rev.* 173 (1952).

²⁹ See the court's discussion in *United States v. Bowman*, 260 U.S. 94, 98 (1922), *et seq.*, stating that statutes relating to crimes against private individuals or their property are to be interpreted as not extending to "those committed outside of the strict territorial jurisdiction" unless Congress has expressly said so, but "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents," and distinguishing *American Banana Co. v. United Fruit Co.*, *supra*, note 28, as relating to "acts done by citizens of the United States against other such citizens in a foreign country." See also Trautman, *op. cit. supra*, note 4, at 312 and 324-326.

³⁰ See generally on the nationality principle and the limitations generally recognized in the laws of the several states, Harvard Research, *Crime*, *supra*, note 2, at 523-535; Trautman, *op. cit. supra*, note 5, at 327 *et seq.*

however, surely protection of those primary interests of a state; the operation of its merchant marine and its national security. If, as is normally the case, the seamen or members of the armed forces are nationals, this may be an added factor, but its real significance is likely to be in minimizing the conflicting interests of another state.

The traditional analysis recognizes the competence of states explicitly to utilize the protective principle to reach the activities of aliens abroad when the security, territorial integrity, or independence of the state is threatened.³¹ The argument for the assertion of jurisdiction is essentially two-fold: (1) offenses of

³¹ The arguments for and against the exercise of jurisdiction on the protective principle are set forth in Brierly's Report on "Criminal Competence of States in Respect of Offences Committed Outside their Territory," Committee of Experts for the Progressive Codification of International Law, and in DeVisscher's observations on the Report, Publications of the League of Nations, 1926, V. 7, p. 2, 20 A.J.I.L. (Spec. Supp.) 252, at 255 (1926), and in the Comments to Articles 7 and 8 of the "Draft Convention on Jurisdiction with Respect to Crime," Harvard Research, *Crime, supra*, note 2, at 543-563. See also Article 33, Restatement, *Foreign Relations Law*, p. 94.

Both the Draft Convention and the Restatement, *Foreign Relations Law*, Article 33, distinguish between the crimes of counterfeiting or falsification of the seals, currency, etc., and other crimes against the security, etc., of the state. Both recognize the propriety of the exercise of jurisdiction in the first class of offences (Article 8 of the Draft Convention and Article 33 of the Restatement), the Restatement noting that the United States has no laws relating to such crimes committed outside its territory, other than 34 Stat. 100 (1906), 22 U.S.C. Sec. 1203 (1952), making it a crime to commit perjury before consular and diplomatic officials of the United States. Exchange controls have created an offense comparable to counterfeiting, with respect to which a state may seek to exercise jurisdiction on the protective principle. See *Public Prosecutor V. L.*, Supreme Court, Holland, Nov. 13, 1951, [1951] Int'l. L. Rep. 206 (No. 48).

The Draft Convention recognizes a qualified jurisdiction in the second class of cases also, providing in Article 7: "A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed." The Restatement is more guarded in that it both limits the jurisdiction to "conduct outside its territory that threatens its security as a State," and attaches a proviso that "the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." See also Comment d to Article 33.

this nature threaten the vital interests of the state; and (2) the state in which they occur is likely to be indifferent regarding them even if they are criminal under its law.³² Reliance on the principle in all except the narrow range of offenses indicated is, however, vigorously—perhaps too vigorously—resisted. It is suggested that the difficulty is not with the basic idea, which may indeed be the fundamental justification for any claim of jurisdiction. The difficulty is rather that a state may assert jurisdiction in reliance on the principle in circumstances in which the territorial state or a third state either believes it has a superior claim to assert jurisdiction or, of more importance, permits, protects, or even compels the acts of the accused. The basic difference between counterfeiting a state's currency abroad and broadcasting attacks on its government from a foreign radio station is not in the threat to the state attacked. The threat may be of equal magnitude, and even of like kind, since counterfeiting can be utilized for political ends as well as private gain. The essential difference lies rather in the protection which countries such as our own properly accord to the right of free speech.

Much the same may be said of assertions of jurisdiction on the passive personality principle,³³ predicated on the nationality of

³² In *Rex v. Holm* and *Rex v. Pienaar*, Appellate Division, Union of South Africa, [1947] Ann. Dig. 91, 92, (No. 33) involving treason by nationals committed abroad, the court observed: "[S]o far as high treason committed by a subject is concerned, there exists no international custom or comity which debars a state from trying and punishing the offender no matter where the offence has been committed. The reason for this is clear: it is because high treason, committed outside the territory of the state concerned, is an offence only against such state. No other state is interested in punishing the offender, and the punishment of the offender by the state concerned does not encroach upon the rights of other states."

The Court of Cassation of France held, in *Re van den Plas* [1955] Int'l. L. Rep. 205, that a Belgian national could be prosecuted in France for treasonable activities against Belgium committed in Belgium, under decrees which applied the French criminal law governing crimes against the security of the state to similar crimes against any state allied with France.

³³ The argument for the passive personality principle may be stated simply: A state cannot be expected to tolerate the presence in its territory, unpunished, of an alien who, while abroad, committed an offense against one of its nationals which, if committed in its territory, would have been punishable under its law. The opposing argument was stated by Judge Moore in the dissenting opinion in the *Lotus* case, *supra*, note 3, at 92, 93:

"It is evident that this claim is at variance not only with the principle

the victim, and the universality principle,³⁴ predicated jurisdiction simply on custody of the accused. If the assertion of jurisdiction on either of these grounds is objectionable, it is not because the state can have no discernible interest, though that interest is

of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.

"No one disputes the right of a State to subject its citizens abroad to the operation of its own penal laws * * *. But the case is fundamentally different where a country claims either that its penal laws apply to other countries and to what takes place wholly within such countries or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they were not subject."

The issue was raised in the well-known *Cutting Incident*, and Moore's Report, [1887] *Foreign Relations*, U.S. 751, is a brief in opposition to the assertion of jurisdiction by Mexico on this basis in that case. The issue was raised again but not decided in the *Lotus* case; Moore's dissent reflects his adherence to the views he had expressed forty years earlier. The widespread criticism of the decision in the *Lotus* case culminated in its being superseded in Article 11 of the Convention on the High Seas, 13 UST 2312, TIAS 5200.

Both the Harvard Research, *Crime*, *supra*, note 2, at 579 and Article 30(2) of the Restatement, *Foreign Relations Law*, p. 87, reject the passive personality principle. Cf. *In re Gonzalez* (Mexico, Sup. Ct.), [1931-1932] Ann. Dig. 151 (No. 79). The decision in *The Attorney General of the Government of Israel v. Eichmann*, 56 A.J.I.L. 805 (1962), and the comment that case provokes may well result in a change in attitudes toward the assertion of jurisdiction on the passive personality and universality principles.

³⁴ Moore reserved his bitterest contempt for the assertion of jurisdiction on this basis: "It is unnecessary to discuss this theory specifically, because * * * it is so rhapsodical and cosmopolitan in its character, and, while intended to be benevolent, is so impractical and intrusive, that it has never assumed a legislative guise." Moore's Report, [1887] *Foreign Relations*, U.S. 751.

It has been observed, however, that "One could, however, reasonably maintain that there is a common interest in punishing 'crime,' irrespective of where it takes place, at least to the extent that there is agreement on what acts are 'criminal,' what is reasonable punishment and what constitutes fair procedure. The policy that crimes committed in one state are of no concern to others is a short-sighted and self-defeating one that, absent treaty, results only in harboring and protecting criminals." Katzenbach, *op. cit. supra*, note 11, at 1143.

likely to be less than overwhelming. After all, there is no bright line between these principles and the objective territorial principle, since impact is necessarily a vague concept and objection must come primarily from other factors. Conspicuous among these is not only whether the states involved take the same or different attitudes towards the accused's activities but also considerations of feasibility and fairness, which are always very much at the fore whenever extraterritorial jurisdiction is in issue.³⁵

The greater the depth of inquiry into the problems of jurisdiction, the greater the appreciation of its many possible facets. A situation is rarely encountered which presents one facet in isolation. A cumulation of factors on one side must be balanced with those on the other. The only logical conclusion seems to be reached by the Restatement (Second), *Conflict of Laws* (Sec. 43 e), that a state has jurisdiction “* * * * [I]f its contacts with a person, thing or occurrence are sufficient to make it reasonable * * *.” Certainly this is true in a problem so complex as that raised by visiting armed forces.

EXTRATERRITORIALITY

It is implicit in all discussions of the problem of criminal jurisdiction that jurisdiction in the sense of the right to enforce or execute the law is exclusively territorial. That jurisdiction in this sense, which includes the right to arrest, charge, try and punish, is, with only the narrowest exceptions, exclusively territorial has been recognized in a wide range of situations.³⁶ This

³⁵ “To the extent that the conduct itself is commonly considered criminal, jurisdiction amounts to no more than broadened venue and is objectionable only in so far as it might, on particular facts, put an unfair burden on defendant in terms of securing evidence, or possibly, be a less efficient place to prosecute for the same reason.” Katzenbach, *op. cit. supra*, note 11, at 1144. See also Harvard Research, *Crime*, 29 *supra*, note 2, at 580–581, quoting the opinions of Fusinato, Mercier and Donnedieu de Vabres; Article 34, Restatement, *Foreign Relations Law*, p. 96.

³⁶ “Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.” The *Lotus* Case, *supra*, note 3, at 18, 19. “It is, of course, universally accepted that no state can perform acts of sovereignty inside the territory of another, nor

precludes seizure of a foreign merchant vessel on the high seas,³⁷ or in the territorial waters of another state,³⁸ or of a vessel of the captor's nationality in a foreign port.³⁹ The disability to exercise police power in a foreign territory⁴⁰ extends to transporting a prisoner through the territory of another state without its consent.⁴¹ The right to exercise such jurisdiction within the

can it send its officials on to foreign soil to arrest, try, or punish offenders there, whoever they may be or whatever they may have done." Beckett, "The Exercise of Criminal Jurisdiction Over Foreigners," 1925 *Brit. Yb. Int'l. L.* 44. See also Article 20, Restatement, *Foreign Relations Law*, p. 64.

³⁷ Chief Justice Marshall, in *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) said: "It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in which that law operates. A power to seize for the infraction of a law, is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power." See also *Church v. Hubbard* 6 U.S. (2 Cranch) 234 (1804). Cf. *Hudson and Smith v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

³⁸ *The Appollon*, 22 U.S. (9 Wheat.) 362, 371 (1824); *The Anne*, 16 U.S. (3 Wheat.) 435 (1818); Mr. Clay, Sec. of State, to Mr. Vaugh, Brit. Min., Feb. 1828, M.S., Notes For. Leg. III 430, 2 Moore, *International Law* 21 (1906). Chargé Lindsay to Secretary Colby, No. 230, Apr. 12, 1920, M.S. Department of State, file 611.44 e 244/5, 2 Hackworth, *International Law* 320 (1941).

³⁹ Mr. Buchanan, Secretary of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, M.S. Inst. Brazil, XV, 119, 2 Moore, *International Law* 4 (1906).

⁴⁰ *In re Jolis*, France, Tribunal Correctionnel d'Auesnes, [1933-1934] Ann. Dig. 191 (No. 77), and authorities cited in the editorial note on 192. For cases involving actions of police of the Canal Zone in the Republic of Panama, see 2 Hackworth, *International Law*, 311 (1941). The United States expressed its regrets when a Captain Haddock arrested a deserter in Canadian territory; the Captain was dismissed and the deserter discharged. Mr. Seward, Secretary of State, to Mr. Stanton, Secretary of War, April 15, 1863, 60 *Dom Ltr* 231, 2 Moore, *International Law*, 370 (1906).

⁴¹ [1877] *Foreign Relations*, U.S. 266, *et seq.*, 2 Moore, *International Law* 371 (1906). The Department of State later abandoned this supersensitive attitude and indicated that, although the United States reserved its right to object, it would ordinarily not do so. It could not, of course, undertake to prevent a prisoner from bringing *habeas corpus* and, absent a treaty or statute under which he could be held, he could obtain his liberty. Memorandum from the Department of State to the Japanese Embassy, Mar. 2, 1907, M.S. Department of State, File 4904, 2 Hackworth, *International Law* 317, 318 (1941). See also Ed. Note, Transit in Extradition Cases, 1 A.J.I.L., Part 1, 465 (1907); 4 Hackworth, *International Law* 216 (1942).

F.E. Hall, "Foreign Powers and Jurisdiction of the British Crown," 81 (1894) states that: "If a person on board a British ship commits a crime

territory of a state is in fact so jealously guarded and meticulously respected that a consul may not serve process unless the authorities of the state to which he is accredited interpose no objection.⁴²

The principle that enforcement jurisdiction may, generally speaking, be exercised only within a state's own territory needs no elaborate justification. The effectiveness of a government would be undermined, and the security of individuals in their liberties threatened, if the law enforcement authorities of another state, deriving their powers from another source and exacting obedience to a foreign law, were free to operate at will within a state. One may regret that these considerations have been so persuasive as to lead states to deny even minimal assistance to other states in law enforcement, except within the narrow limits of the operation of extradition treaties; however, this is far from saying that it would be desirable for states to be permitted to exercise wide enforcement jurisdiction in other states. Experience suggests, rather, that where enforcement jurisdiction is so exercised, by consent, not all the problems discussed above disappear—in fact, some of them become more acute and new problems arise.

Given their traditional adherence in theory and in practice to the territorial principle, some may consider it remarkable that the Anglo-American countries should have exercised extraterritorial jurisdiction, in the full—and common—sense of the term for so long and in so extensive an area.⁴³ No logical difficulty is presented here—the extraterritorial jurisdiction was exercised by consent—but the Anglo-American position rests on policy con-

on the high seas and is brought in custody into a foreign port, the territorial authorities will not interfere with his being kept in custody on board, nor with his being transferred to another vessel for conveyance to England." Cf. *Regina v. Lesley* [1858–1860], Bell's C. Cas. 220, 8 Cox Crim. Cas. 269 (1860), where an indictment was sustained against the master of a British ship who contracted with the Chilean government to convey to Liverpool certain Chileans who had been ordered banished, for continuing to detain the prisoners on the high seas, after leaving Chilean waters. Chile was, of course, not the flag state nor could it claim territorial jurisdiction. For a criticism of the holding, see 2 Moore, *International Law* 215 (1906). See also Restatement (Second), *Conflict of Laws*, sec. 43 f (Tent. Draft No. 3, 1956), which is expressly *contra*.

⁴² 2 Hackworth, *International Law* 119 (1941).

⁴³ See Justice Frankfurter's review of the history of extraterritoriality in his concurring opinion in *Reid v. Covert*, 354 U.S. 58–64 (1956).

siderations as well as logic. Factually it is accurate to say that they departed from the territorial principle when circumstances so dictated.

The United States at one time exercised extraterritorial jurisdiction in a broad belt of countries stretching from Morocco to Japan. It did so for varying periods in different countries but collectively for more than a century and a half. The first treaty conceding American extraterritorial jurisdiction was that of 1787 with Morocco,⁴⁴ and Morocco was the last major country in which it was surrendered;⁴⁵ but at one time the list included Borneo, China, Japan, Korea, Madagascar, Muscat, Morocco, Persia, the Samoan Islands, Siam, Tripoli, Tunis and Turkey.⁴⁶

The scope of extraterritorial jurisdiction exercised by the United States—and correlatively, the immunity enjoyed by its nationals—varied from country to country. In China, from 1844 to 1943, it was virtually complete, although for the redress of injuries suffered at the hands of a Chinese an American was dependent on local law.⁴⁷ The conduct of American nationals was subject to the regulation only of American law.⁴⁸ Since the reach

⁴⁴ Hinckley, "American Consular Jurisdiction in the Orient," 18 (1906).

⁴⁵ On October 6, 1956. Young, "The End of American Consular Jurisdiction in Morocco," 51 A.J.I.L. 402 (1957).

⁴⁶ 2 Moore, *International Law* 593 (1906).

⁴⁷ The present comment will be limited largely to the China experience as adequate to illustrate the nature of the jurisdiction exercised and the problems to which the system gave rise.

⁴⁸ The Treaty of Wang-Hiya of July 3, 1844, 8 *U.S. Statutes at Large* 572, 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers 1776-1909*, 196-202 (1910), the first Chinese-American treaty conceding extraterritoriality, provided, in Article XXI, that "* * * citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul, or other public functionary of the United States, thereto authorized, according to the laws of the United States." Hinckley notes that Japan took the position that it had full sovereign power to prohibit the commission of any crime; that the provisions of the Japanese treaty related only to trial and punishment—to the remedy, not the obligation. It was United States policy to require its citizens to observe the regulations laid down by the local governments relating to security, good order, health and general welfare, and to enforce them in the consular courts, but other treaty powers took the position their nationals were subject only to their country's laws, and in 1879 were "indisposed to enforce quarantine restrictions prescribed by Japan for preventing the bringing in of cholera from other countries of the Far East." But the United States cooperated.

of American criminal law is normally limited to American territory, and under the federal system criminal law is largely state law, this raised a difficult problem, never quite satisfactorily solved.⁴⁹ Judicial authority was exercised primarily by the American consuls,⁵⁰ but they were required in some instances to utilize the assistance of other citizens, and limited jurisdiction, original and appellate, was given the ministers.⁵¹

Consuls were authorized to issue warrants for the arrest of any American,⁵² and the arrest was made by the consular marshal or, where none was available, by a special constable or marshal appointed by the consul or by the local authorities at the request of the consul. It appears that Americans could, on the other hand, be arrested by the local police only in the act of committing flagrant crime; that even then they could not be jailed by the local authorities, but had to be immediately turned over to their consul; and that the dwelling, place of business or ship of an American could be entered to search for or arrest even native offenders, only with the assent of the consul and, if he thought necessary, only in the presence of a consular officer.⁵³

The institution of proteges was never established in China.

Hinckley, *op. cit. supra*, note 44, at 98. The Treaty of 1858 read: “* * * [C]itizens of the United States, either on shore or in any merchant vessel, who may insult, trouble or wound the persons or injure the property of Chinese, or commit any other improper act in China, shall be punished only by the Consul or other public functionary thereto authorized, according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities.” 1 Malloy, *Treaties*, Article XI, 211, 215 (1910).

⁴⁹ The first statute implementing the exercise of extraterritorial jurisdiction by the United States was that of 1848, 9 Stat. 276; a more comprehensive act was passed in 1860, 12 Stat. 72. There were several amendments, and these enactments were in 1878 consolidated in the Rev. Stat. Secs. 4083-4130.

⁵⁰ There is reason to doubt such jurisdiction could now be constitutionally conferred on consuls, in view of the comments on *In re Ross*, 140 U.S. 453 (1891) in *Reid v. Covert*, 354 U.S. 1 (1957).

⁵¹ Rev. Stat. Secs. 4089, 4090, 4109, 4095, 4106, 4102, 4103.

⁵² Rev. Stat. 4087.

⁵³ Hinckley, *op. cit. supra*, note 44, at 103. The scope of the right of the Chinese police to arrest Americans, and of the correlative immunity of Americans from arrest by them, is not clearly spelled out in the treaties. It appears that the relative immunity of Americans from arrest by the Chinese police was fortified and extended by custom. See 2 Moore, *International Law* 599 (1906).

Protection was, however, given and American jurisdiction asserted not only with respect to citizens of the United States by birth or naturalization and native inhabitants of its insular possessions, but also with respect to seamen on American ships, whatever their nationality. At least limited protection seems also to have been accorded employees of American citizens.⁵⁴

The century of American experience of extraterritorial jurisdiction in China, although not without its defenders,⁵⁵ seems to be viewed by many as evidencing a dubious choice between two evils. Among the reasons which are said to have led to the insistence on extraterritorial privileges are: (1) The Chinese law of homicide was not sufficiently discriminating, and in dealing with foreigners the existing discriminations were not observed; (2) the system of punishment involved severe penalties and humiliations, without thought of reformation or deterrence except through fear and force, by such sanctions as death by slicing, decapitation and strangulation; (3) torture both of the accused and of witnesses was used, the accused being presumed guilty but no punishment being possible without a confession; (4) conditions in the prisons, used primarily for the detention of the accused and of witnesses before trial, rather than for punishment, were intolerable, and many of the imprisoned died; (5) the principle of vicarious responsibility was applied, to the family, the town or other group, in criminal cases; (6) the administration of

⁵⁴ Hinckley, *op. cit. supra*, note 44, at 78, 85; 2 Moore, *International Law* 588 (1906).

⁵⁵ Hinckley apparently viewed it as in the nature of a missionary enterprise. His work, *op. cit. supra*, note 44, opens with the statement: "The extension of European domination throughout much of the orient has, in our own day, opened a prospect of wonderful development of eastern peoples in general civilization, in methods of government necessary for protection of life and property, and in conceptions of justice and of the utility and authority of courts of law."

"Only one oriental nation, the Japanese, is thus far admitted actually to have assimilated enough of western jurisprudence to entitle its government to exercise full responsibility for the protection of foreigners within its territory."

See also Denby, "Extraterritoriality in China," 18 A.J.I.L. 667, (1924) for a vigorous defense of the system. The author, a one-time minister to China, answers the argument sometimes made that traders in China in pre-treaty days did not demand extraterritorial privileges with the observation (p. 670) that "Foreigners sacrificed all personal considerations to secure permission to trade."

justice was in the hands of administrative officials, there being no separate judiciary, and was notoriously corrupt; and (7) there was a prejudice against foreigners.⁵⁶

It is not surprising that the United States should have been reluctant to see its nationals subjected to a system of justice which had, or was said to have, these attributes. American extra-territorial jurisdiction in actual operation has, however, been criticized with perhaps equal vigor. The principal criticism was that in practice American law-breakers enjoyed immunity from punishment, at the same time that they demanded the most vigorous enforcement of Chinese law against such Chinese as offended against them. This is said to have produced great resentment among the Chinese and intensified their anti-foreign attitude.⁵⁷

⁵⁶ Williams, "The Protection of American Citizens in China: Extraterritoriality," 16 A.J.I.L. 43; (1922) Quigley, "Extraterritoriality in China," 20 A.J.I.L. 46 at 50 (1926). Quigley notes that on the Chinese side it was said that most foreigners did not understand Chinese legal procedure, in general the penalties imposed were no more severe than in European countries, torture was not applied to foreigners, and decisions involving foreigners were given in accordance with Chinese law.

⁵⁷ "The strongest plea for the abolition of extraterritoriality lies in the abuse of this privilege on the part of subjects of foreign Powers who use it as a cloak for illegal acts. The continued smuggling of opium and morphine into China is but a single example, although the most striking, of the wrong that is being done to China under the cloak of a foreign extra-territorial jurisdiction." Bishop, quoted in Quigley, *op. cit. supra*, note 56 at 59. Burlingame, Minister to China, wrote the State Department with reference to the execution of one Buckley for murder: "Such men as * * * Buckley had so long escaped punishment that they had come to believe that they could take life with impunity. The United States authority was laughed at and our flag was made the cover for all the villains in China." [1864] *Foreign Relations*, U.S. Part 3, p. 400; Williams, chargé d'affaires, wrote the following year: "Cases have already occurred in China of aggravated manslaughter, and even of deliberate killing of the natives by foreigners, whose crimes have been punished by simple fines or mere deportation or short imprisonment; while foreigners strenuously insist on full justice when life is taken by the natives; or maiming with intent to kill." [1865] *Foreign Relations*, U.S. Part 2, p. 454. The Consul General at Shanghai wrote in 1871: "It would be difficult to say that the extra-territorial system is not often productive of injustice to the Chinese. * * * A few years ago the Viceroy at Nanking, in presenting a case on behalf of some poor boat people, whose vessel had been sunk by a foreign steamer, declared that the frequency of such accidents had so aroused the people that he feared they would endeavor to make reprisals should the foreign courts

It has been said that partial and lax law enforcement are inherent characteristics of extraterritoriality.⁵⁸ Again, the assignment of judicial functions to consuls, untrained in the law, primarily concerned with protecting the interests of their nationals and occupied with other duties, has been pointed to as a fundamental weakness of the system.⁵⁹ The inability of the consul to

continue to refuse redress." [1871] *Foreign Relations*, U.S. 170; Williams, *op. cit. supra*, note 56, at 49. In 1904, an unoffending Chinese of good standing was thrown into the water by a group of drunken sailors, identified as Americans, and drowned, but no one was ever brought to justice. Williams says of this case that "A great deal of intense feeling was aroused in Canton * * * and the native and foreign press was very caustic in commenting on this apparent breaking down of justice. The native press in particular contrasted the indifference of the American enforcement of the law in this case with the unusual energy displayed in demanding redress for crimes committed against foreigners by Chinese. The American government finally paid an indemnity of \$1,500 to the family of the murdered man. But the feeling was only partially allayed; and in the case of the Lienchou murders a year later, when five Americans were killed, the Canton correspondent of the *North-China Herald* attributed the anti-American feeling, which was a partial cause of the crime, to the failure of justice in the case of the murder at Canton." Williams, *op. cit. supra*, note 56, at 50.

⁵⁸ "[T]here are strong reasons for expecting an indifferent administration of the law under a system of extraterritoriality. A crime is an offense against society which society must punish. An aroused public opinion gives vigor to the enforcement of the law, demands adequate police protection and jail facilities and upholds the hands of the judiciary. With public opinion awakened the machinery of the law will operate smoothly; but when the public slumbers an inevitable inertia results. Under a system of extraterritoriality the injured society is powerless to apply punishment to foreigners who offend against it. Foreign officials must pass judgment upon them. There is no aroused public sentiment urging the foreign government to a vigorous enforcement of its laws. An indifference results, which is only increased by the element of racial prejudice." Williams, *op. cit. supra*, note 56, at 48, 49.

The strongest of proponents of the territorial principle observed: "The privileged consular jurisdiction produces the desired effect of insuring the European against the dangers of a barbarous criminal and civil tribunal; but the advantages of an exemption from the natural system of territorial jurisdiction can only be purchased at the price of much countervailing evil. All foreign criminal jurisdiction, even that exercised by a civilized on the soil of an uncivilized nation, is a feeble and defective instrument, and the tendency of the privileged European jurisdiction in the Turkish Empire is stated, in general, to be the impunity of the European criminal." Lewis, *Foreign Jurisdiction and the Extradition of Criminals*, 16 (1859).

⁵⁹ "The first duty of a Consul is to protect the interests of his sovereign's subjects; it is scarcely consistent to add to that duty the task of adminis-

compel the attendance of witnesses or to punish for perjury witnesses not of American nationality, and other limitations on his authority inherent in a jurisdiction based on nationality rather than territorial sovereignty was another defect of the system.⁶⁰ The same limitation gave rise to inequality in the treatment accorded the nationals of the several powers exercising extra-territorial jurisdiction in China for the same acts. The small number of consuls made the prosecution of offenses committed at a distance from any consulate subject to the common shortcom-

tering justice when a complaint is brought against that subject; and the duties of protection of a class and the administration of impartial justice between that class and others cannot but clash. Only too often is the verdict of the extraterritorial court a formula as of course, 'judgment for the defendant,' and the defendant has then every reason to be satisfied that he has an efficient consular service." Latter, quoted in Williams, *op. cit. supra*, note 56, at 53.

"[I]n addition to his commercial functions, the consul of a treaty state performs the numerous roles not only of a judge sitting over civil and criminal actions instituted against his fellow nationals, of a coroner, registrar, probate judge, and police magistrate, but also that of an advocate in the court of the native defendant on behalf of his aggrieved fellow-national. * * *

"* * * They are unfitted for the task [of exercising judicial functions] for three principal reasons: (1) Their first duty is to protect the interests and persons of their nationals; (2) they are generally men not trained in the law; and (3) their national bias often creeps unconsciously into their action and decisions." Mah, "Foreign Jurisdiction in China," 18 A.J.I.L. 676 (1924), at 685, 688. See also Williams, *op. cit. supra*, note 56, at 51, 52.

⁶⁰ "The jurisdiction of the ministers and consuls usually is limited to proceedings against persons of their own nationality. In this sense nationality operates as a limitation upon the jurisdiction; and in the same way the nationality of the plaintiff, or even of a witness, may, in certain contingencies, raise an obstacle to the effective exercise of jurisdiction." 2 Moore, *International Law*, 600 (1906).

"[T]he consular courts are empowered to take cognizance only of the acts of their own nationals. In short, their jurisdiction is personal. This defect conduces to the compromising of justice, because the court has no power to compel a witness of another nationality to testify. Nor has the court power to inflict punishment, either by fine or imprisonment, for perjury committed by a person of another nationality." Mah, *op. cit. supra*, note 59, at 688.

"The United States consul at Kanagawa [Japan] having fined for contempt a British subject who, as a witness, refused to answer certain questions, the British consul, to whom application was made for the enforcement of the penalty, refused to require either the payment of the fine or to impose the alternative of imprisonment for non-payment * * *." 2 Moore, *International Law*, 604 (1906).

ings of trials remote from the place where the crime was committed.⁶¹ The lack of prison facilities on occasion led to the freeing of convicted criminals.⁶²

The foregoing review of our experience of exercising extraterritorial jurisdiction in China is not intended to suggest that the exercise of court-martial jurisdiction over our troops abroad is subject to the same criticisms. It does, however, warn that there are inherent difficulties in any exercise of extraterritorial jurisdiction which can, at best, only be minimized.

⁶¹ Minister Reed is quoted as saying: "The foreigner who commits a rape or murder a thousand miles from the seaboard is to be gently restrained, and remitted to a Consul for trial, necessarily at a remote point, where testimony could hardly be obtained or ruled on." Williams, *op. cit. supra*, note 56, at 53, quotes from a pamphlet of the Chinese National Welfare Society in America, "The Shantung Question, A Statement of China's Claims, etc.," (1919), p. 164:

"But if the latter [the consul] is stationed, as he generally is, at a great distance from the scene of the crime, the accused is practically assured of his liberty because the personal appearance at court of native witnesses is made most difficult, if not impossible, owing to the poor communications, and the time and expense required to make the trip. Insufficiency of evidence has too frequently resulted in the denial of justice."

⁶² Minister Reed, referring to the situation after fourteen years of the exercise of extraterritorial jurisdiction in China, said: "We extort from China 'ex-territoriality', the amenability of guilty Americans to our law, and then we deny to our judicial officers the means of punishing them. There are consular courts in China to try American thieves and burglars and murderers, but there is not a single jail where the thief or burglar may be confined. * * * I consider the exaction of 'ex-territoriality' from the Chinese, so long as the United States refuse or neglect to provide the means of punishment, an opprobrium of the worst kind. It is as bad as the coolie or the opium trade." Sen. Doc. 30, 36th Cong., 1st Sess., p. 355, Williams, *op. cit. supra*, note 56, at 49.

CHAPTER II

IMMUNITIES

In making a determination of a jurisdictional problem, it is not enough to weigh a state's claim to assert jurisdiction in terms of the accepted bases of jurisdiction. Claims for immunity, predicated either on the status of the accused as an agent of a state or the official character of the acts constituting the offense must also be taken into account. A member of an armed force is an agent of the state which he serves, and many of his acts are done in the performance of his official duties. A common assertion is that, as an agent of the state, he is immune from the jurisdiction of any other state, and that in any event his acts done in the performance of duty cannot be the basis of prosecution by any other state. Before discussing the validity of these claims directly, a review of the situation with respect to the immunities accorded other agents of a state is desirable. In any inquiry in this area, however, it should be borne in mind that jurisdiction is the norm, immunity the exception, and the existence of an immunity must be affirmatively demonstrated. There is, moreover, a discernible tendency to restrict the scope of even the immunities recognized.

The immunity of states is still widely accepted¹ but application of the doctrine has been limited—in particular in the commercial transaction field. The basis of state immunity has been attacked on the ground that neither the equality and independence of states nor their dignity requires they be exempt from normal judicial processes with respect to their activities in foreign states, especially if in areas of similar activities the state submits to the jurisdiction of its own courts in respect to claims brought against it.²

¹ See the Comment to Article VII of the Draft Convention on the Competence of Courts in Regard to Foreign States, Harvard Research in International Law, 26 A.J.I.L. (Supp.) 727 (1932).

² "Thus no legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts

PERSONAL IMMUNITY

Certain agents of a foreign state, notably those with diplomatic status, enjoy personal immunity from the jurisdiction of the territorial state. The fiction of extraterritoriality at one time contributed to shaping diplomatic immunities. It seems unnecessary to point out at this juncture the many facets of the law of diplomatic immunities which are inconsistent with such a premise.³ This is not to say either that there are no rules with respect to diplomatic immunities which do not owe their origin at least in part to the extraterritorial concept or that it is now entirely without influence. Again, respect for the sending state has been and continues to be a factor.⁴ Emphasis has, however, shifted to the need for protection of diplomats in the performance of their functions. This is not, of course, a rule of law, but a policy consideration

concluded or torts committed in the territory of the state assuming jurisdiction. On the contrary, the sovereignty, the independence, and the equality of the latter are denied if the foreign state claims as a matter of right—as a matter of international law—to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that State.” Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States,” 1951 *Brit. Yb. Int’l. L.* 220, 229. See also 1 Lauterpacht-Oppenheim, *International Law*, 272, 273 (8th ed., 1957).

³ “The Committee does not consider that the conception of extraterritoriality, whether regarded as a fiction or given a literal interpretation, furnishes a satisfactory basis for practical conclusions. In its opinion, the one solid basis for dealing with the subject is the necessity of permitting free and unhampered exercise of the diplomatic functions and of maintaining the dignity of the diplomatic representative and the State which he represents as the respect properly due to secular traditions.” “League of Nations, Committee of Experts for the Progressive Codification of International Law,” Questionnaire No. 3, January 1926, 20 *A.J.I.L.*, (Spec. Supp.) 148, 149 (1926).

⁴ “The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolize something to which deference and respect are due, and they are consequently treated with deference and respect themselves.” Hall, *International Law*, 218–19 (8th ed., Higgins, 1924). See also Pruess, “Capacity for Legation and the Theoretical Basis of Diplomatic Immunity,” 10 *N.Y.U.L. Rev.* 170, 182 (1932).

which is shaping the law not only with respect to diplomats but with respect to other officials of a state.⁵

There is less than complete agreement regarding which agents of foreign states are entitled to personal immunity. The immunity of heads of state,⁶ foreign ministers,⁷ ambassadors and others with diplomatic status and their families is universally recognized, but that of the administrative and service staff of a diplomatic mission is at best doubtful.⁸ Again, a consul has no general im-

⁵ Comment a to Article 76 of the Restatement, *Foreign Relations Law*, p. 252, reads: "The most widely accepted rationale for diplomatic immunity is that it assures governments that they will not be hampered in their foreign relations by harassment of, or interference with, their diplomatic representatives. Protection of the performance of diplomatic functions requires that those charged with such performance not be subject to intimidation by persons in the receiving state. Furthermore, states recognize that immunity of their diplomatic personnel in other states may be conditioned upon a reciprocal grant of immunity to such personnel of the other states." See also Comment b to Article 77 at p. 257; Ogdon, "The Growth of Purpose in the Law of Diplomatic Immunity," 31 A.J.I.L. 449 (1937).

⁶ Traditionally, the immunity is referred to as that of foreign sovereigns, but it seems clear that it is equally available to any head of state. 1 Hyde, *International Law*, 817 (2d ed. rev. 1945). See, with respect to the immunity of a sovereign, Hall, *op. cit. supra*, note 4, at 220; see generally, Article 69, Restatement, *Foreign Relations Law*, p. 219.

⁷ "No precedents have been found dealing with the immunity of the head of a government or that of a foreign minister, but in view of the extensive immunity granted to diplomatic officials * * * it is to be presumed that a foreign minister while on an official visit to the government of the territorial state has an equal immunity, both as to official and as to private acts." Reporters' Notes 1 to Article 69, Restatement, *Foreign Relations Law*, p. 222.

⁸ Article 37 of the Vienna Convention on Diplomatic Relations, signed April 18, 1961, accords immunity to members of the administrative and technical staff of a mission and their families, if they are not nationals of or permanently resident in the receiving state; members of the service staff who are not nationals of or permanently resident in the receiving state are accorded immunity in respect of acts performed in the course of their duties. See also The Report of the Sub-Committee (Diena), League of Nation's Committee of Experts for the Progressive Codification of International Law, 20 A.J.I.L. (Spec. Supp.) 163 (1926); and Gutteridge, "Immunities of the Subordinate Diplomatic Staff," 1947 Brit. Yb. Int'l. L. 148. Administrative and service personnel are accorded immunity in the United States by statute (Title 22 U.S.C., Secs. 252-54) subject to certain reservations, but in according such immunity the United States seemingly goes beyond its obligation under international law. Articles 76 and 77 of the Restatement, *Foreign Relations Law*, p. 252, 255, and Comment c to Article 76 and Comments (e) through (g) to Article 77, p. 253 and 259-61.

munity, but immunity only with respect to his official acts⁹ or perhaps such immunity as is necessary for the proper performance of his functions.¹⁰ The great majority of the civilian employees of the United States do not enjoy personal immunity when abroad.¹¹

Personal immunity for one agent of a foreign state clearly cannot be inferred from the existence of such immunity with respect to another agent in a different category. There are abundant reasons why this should be so. In so far as personal immunity derives from respect for the sending state, it is relevant that the dignity of that state is much more significantly engaged where the agent is the Head of State, the Foreign Minister or an Ambassador than where he is a minor employee of a mission.

Diplomatic immunities in particular have a long history, which accounts for the present scope of these immunities perhaps more than does any theory or combination of theories, which have something of the quality of rationalization after the fact. Further, and of more importance, the nature of a diplomat's functions¹² make

⁹ Article 21, Draft Convention on the Legal Position and Functions of Consuls, Harvard Research, *op. cit. supra*, note 1, at 338; Beckett, "Consular Immunities," 1944 Brit. Yb. Int'l. L. 34. See Lee, *Consular Law and Practice* (1961) for a comprehensive treatment of the status of Consuls.

¹⁰ Article 85, Restatement, *Foreign Relations Law*, p. 287.

¹¹ "Questions have been raised before this committee about the diplomatic status of State Department and other civilian officials. In the first place, it should be made clear that the great majority of State Department personnel overseas do not have immunity from local criminal jurisdiction. On the contrary, most United States civilian officers and employees abroad, including those of other governmental agencies, as well as the State Department, have neither immunity nor the special guarantees provided United States servicemen by the Status of Forces Agreement. They are completely subject to local criminal jurisdiction, whether on duty or off duty." Deputy Under Secretary Murphy, Hearings on H.J. Res. 309 Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 167 (1955). See, however, the Vienna Convention on Diplomatic Relations, *supra*, note 8.

¹² Article 3 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, defines the functions of a diplomatic mission as consisting *inter alia* in:

- "(a) representing the sending State in the receiving State;
- (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) negotiating with the Government of the receiving State;
- (d) ascertaining by all lawful means conditions and developments in

a peculiarly compelling case for personal immunity. He is not simply physically in the country, but intimately involved with its government. Basically, his functions are to acquire information and to do all he legitimately can to shape attitudes and events most favorably to his own state. To do this, he must inquire, suggest, persuade, negotiate, and bargain; all of which involve direct relations with the foreign government. The subtleties of his functions make subtle pressures upon him possible, and hence call for a maximum of protection from those pressures, even those exerted indirectly, through his family or, perhaps, his domestic servants. Also, the protection must be adequate to the situation in the unfriendliest foreign country,¹³ and it is obviously impractical to vary its scope depending on the prevailing climate of particular bilateral relationships. All this suggests that protection of the diplomatic function, without more, justifies complete personal immunity for diplomats and their associates. The process of accreditation and particularly the right to declare a diplomat *persona non grata* not only reflect and emphasize the nature of the diplomat's relationship with the state to which he is accredited, but provide something of a substitute sanction for those supplied by the criminal law. This is not to say that there is no functional basis for according immunity to other agents of a foreign state than diplomats, but that the status of each class must be separately judged in the light of the particular circumstances.

The importance of these considerations, and the present disposition to restrict the immunities of those in comparable categories but the scope of whose immunities is not firmly established, is revealed in the history of such international organizations as the League of Nations and the United Nations. Two classes of individuals are involved, representatives of member states and officials of the organizations, and their status differs. Representatives of members who have diplomatic rank, even though not accredited to a sovereign state, have been said to enjoy diplomatic

the receiving State, and reporting thereon to the Government of the sending State;

(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

¹³ "[O]ur diplomatic personnel are often required to live and work in hostile lands where immunity is essential to their work and to their safety." Deputy Under Secretary Murphy, Hearings, *supra*, note 11, at 167.

privileges and immunities under international law.¹⁴ This is not unchallenged,¹⁵ however, and in any case there is doubt regarding the officials to be included in this class. Officials of international organizations, which lack the capacity for legation, appear not to be entitled to diplomatic privileges and immunities in the absence of treaty,¹⁶ and the United States is said to have been particularly adamant in its adherence to this view.¹⁷

The Covenant of the League provided in Article 7 that "Representatives of the Members of the League and officials of the League shall enjoy diplomatic privileges and immunities."¹⁸ The Covenant, in according full diplomatic privileges and immunities to representatives of members and officials of the League, followed a pattern established in many prior treaties. The shift to the functional approach to the problem of immunities, with a resulting limitation in their scope, is reflected in the corresponding provision of the Charter of the United Nations. Art. 105, paragraph 2, provides: "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." The General Convention on Privileges and Immunities of the United Nations,¹⁹ suggests that in the view of the General Assembly the necessary immunities from criminal jurisdiction of both representatives of members and officials are limited.²⁰

The United States has not ratified the General Convention, and

¹⁴ Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 A.J.I.L. 694, 699 (1931); Kunz, "Privileges and Immunities of International Organizations," 41 A.J.I.L. 828, 843 (1947).

¹⁵ Article 89, Restatement, *Foreign Relations Law* and Comment b thereto, p. 311.

¹⁶ Preuss, *op. cit. supra*, note 14, at 695.

¹⁷ Preuss, "The International Organizations Immunities Act," 40 A.J.I.L. 332, 333 (1946), citing the opinion given by the Department of State to the British Embassy, 1 *Foreign Rel. U.S.* 414 (1929). See also Reporters' Note 1 to the Introductory Note to Topic 4 of Chapter 4 of the Restatement, *Foreign Relations Law*, p. 292.

¹⁸ For the manner in which this was implemented, see Preuss, *op. cit. supra*, note 14, at 699; and Kunz, *op. cit. supra*, note 15, at 844.

¹⁹ 1 U.N. Treaty Series 15 (1950).

²⁰ See Articles V, VI and X. Members are placed under a duty to waive the immunities accorded where they would impede the course of justice and can be waived without prejudice to Members interests.

in the host state the immunities of representatives of members and officials of the United Nations depend primarily on the Headquarters Agreement²¹ and the International Organizations Immunities Act.²² The Headquarters Agreement goes beyond the requirements of the Charter and grants to resident representatives and certain members of their staffs "the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it."²³ On the other hand, the Headquarters Agreement makes no reference to officials of the United Nations, and their immunity from criminal jurisdiction. Under the International Organizations Immunities Act it is strictly limited to that for official acts.²⁴ Moreover, not only are the benefits accorded by the Act subject to the requirement that the President prescribe the organization, and to the President's power to withdraw, condition or limit such benefits,²⁵ but the Secretary of State is given power to declare any individual *persona non grata*.²⁶

The limited immunity of United Nations officials under the Act was further restricted in the *Ranollo Case*, a prosecution against the chauffeur of the Secretary-General for speeding while driving the Secretary-General to a conference with officials of the City of New York on United Nations business.²⁷ The court indicated it would have accepted as conclusive a suggestion of the Department

²¹ 61 Stat. 760 (1947), TIAS No. 1676.

²² 59 Stat. 671 (1945), 22 U.S.C. Sec. 288d (1958). On the issue of whether the Act implements completely the obligations of the United States under the Charter, see Preuss, *op. cit. supra*, note 14, at 341.

²³ Section 15.

²⁴ Section 288 (d) (b) reads: "Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers or employees except insofar as such immunity may be waived by the foreign government or international organization concerned." Section 288 e (c) adds that "No person shall, by reason of the provisions of said sections, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein."

²⁵ Section 288.

²⁶ Section 288 (e). For a criticism of this grant of power to the Secretary of State, see Preuss, *op. cit. supra*, note 14, at 339.

²⁷ *Westchester County v Ranollo*, 187 Misc. 777, 67 N.Y. Supp. 2d 31, 41 A.J.I.L. 690 (1947), City Ct., New Rochelle, (1946).

of State that the chauffeur was immune²⁸ but in the absence of such advice undertook to decide the jurisdictional issue, and held the chauffeur not immune. The case is interesting not so much for its result as for the reasons given, particularly the emphasis placed upon the "equal administration of justice" and the objection voiced to the creation of a "large preferred class within our borders."

In summary, the history of the immunities accorded representatives to and officials of the League of Nations and the United Nations highlights the degree to which the personal immunity of diplomats accredited to the territorial state is *sui generis*. It also suggests that with respect to other agents of foreign governments whose immunity is not firmly established, states are prepared to accord only that immunity which is essential to the performance of their specific functions. There is little disposition to group all officials of a foreign government in the same class, and accord all the same immunity, regardless of function.

OFFICIAL ACTS

A second major issue is whether an agent of a foreign government who does not enjoy personal immunity may nevertheless claim immunity with respect to acts done in the performance of his official duties. It has been asserted that there is a general rule of international law according such immunity²⁹ but there is much reason to challenge that assertion.

²⁸ The chauffeur's appointment had been duly notified to and accepted by the Secretary of State, and the Legal Adviser had advised the Secretary-General that in his opinion the chauffeur was entitled to the immunity. Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranollo Case," 41 A.J.I.L. 555, 556-57 (1947). On the issue of the conclusiveness of a State Department certificate, see pp. 559-65, and on the appropriateness of the jurisdictional issue being decided by the court, see p. 573.

²⁹ The Comment to Article 18 of the Draft Convention on Diplomatic Privileges and Immunities, Harvard Research in International Law, 26 A.J.I.L. Supp. 15, 99 (1932) states that: "International law imposes upon the courts of the receiving state an incompetence *ratione materiae* in the case of public acts. * * *. Immunity for official acts, as the application of a general principle of international law, and attaching to the intrinsic nature of the acts themselves, does not constitute a part of 'extritoriality' or diplomatic immunity in the strict sense, which imposes upon the court an incompetence *ratione personae*. It applies to all public acts, by whomsoever performed, and to all state agents, whether diplomatic or otherwise." See to

There is no such general principle of municipal law. The immunity of the state from suits by its citizens or subjects, if it exists, does not imply, as a corollary, immunity for its agents.³⁰ This rule of law is subject to qualification in the United Kingdom "in the case of acts committed abroad against a foreigner."³¹ This qualification is, however, concerned only with the jurisdiction of the British courts with respect to Acts of State of agents of the British Crown. It embodies a principle of British constitutional law stemming from certain concepts regarding the separation of powers, rather than a rule of international law.³²

Whether an agent of a foreign state is immune from the jurisdiction of the territorial sovereign is a quite different question. The immunity, if it exists, is an extended application of the doctrine that "every sovereign State is bound to respect the in-

the same effect Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunity," 10 N.Y.U.L. Rev. 170, 178-80 (1932).

The Restatement, *Foreign Relations Law*, asserts, however, in Comment C to Article 69, p. 221 that: "Public ministers, officials or agents of a state do not have immunity from personal liability, even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state or unless they have one of the specialized immunities * * *."

³⁰ In *Johnstone v. Pedlar* [1921], 2 A.C. 262, an action by a United States citizen to recover money taken from him when he was arrested for illegal drilling, the House of Lords rejected the defense of Act of State, Viscount Finlay saying, at 271: "It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person, the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be." See also Dicey, *Conflict of Laws* 163 (7th ed. 1958). Cf., *Barr v. Matteo*, 360 U.S. 564 (1959), *Howard v. Lyons*, 360 U.S. 593 (1959).

³¹ Viscount Finlay in *Johnstone v. Pedlar*, *id.*, at 271. This dictum was based on *Buron v. Denman*, [1848] L.R. 2 Ex. 167, 189, in which Commander Denman, who had burned the Spanish plaintiff's slave ships and freed a large number of slaves in territory on the West Coast of Africa, where slavery was lawful, was sued in trespass in an English court. Baron Parke, in leaving to the jury the issue of ratification of Denman's acts by the British government, stated that ratification would give the plaintiff "a remedy against the Crown only (such as it is) and actually exempts from all liability the person who commits the trespass." See also 26 *Halsbury's Laws of England* 251 (2d ed., 1937).

³² Mann, "The Sacrosanctity of the Foreign Act of State," 59 L.Q. Rev. 42, 45 (1943).

dependence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”³³ The doctrine, so broadly stated, has been increasingly attacked but has been reaffirmed by the Supreme Court.³⁴ To a substantial yet indefinable degree it stems from notions regarding the separation of powers and is hence to that degree a rule of municipal rather than of international law.³⁵ Usual application of the doctrine is in cases in which the act of the foreign state is only indirectly involved, as in litigation involving private rights alleged to have been created by act of the foreign state. Critics have urged that, at least as to Acts of State other than legislation or judgments, the doctrine should be applied only where the Act of State “is done subject to or is recognized by that legal system which governs the legal relationship concerned,”³⁶ in keeping with the approach of private international law. The confiscation cases are hence

³³ *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see also 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 2, at 267.

³⁴ *Banco Nacional de Cuba v. Sabbatino*, 32 U.S.L. Week 4229 (Mar. 23, 1964). For criticism of the doctrine, see Mann, *op. cit. supra*, note 32, at 155; Zander, “The Act of State Doctrine,” 53 A.J.I.L. 826 (1947); “Act of State Immunity,” 57 Yale L.J. 108 (1947); “A Reconsideration of the Act of State Doctrine in United States Courts,” a report of the Committee on International Law of the Association of the Bar of the City of New York, May, 1959. See also Kingsberry, “The Act of State Doctrine,” 4 A.J.I.L. 359 (1910); W. Harrison Moore, *Act of State in English Law* (1906). But see Falk, *Toward a Theory of Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 26 Rutgers L. Rev. 1 (1961).

³⁵ “The Act of State Doctrine is not of itself a rule of public international law. In the United States the doctrine would appear to be largely a consequence of judicial deference to the executive branch imposed by the separation of powers in our constitutional system. Public international law does not prohibit the courts of one State from reviewing the validity of the acts of a foreign government under international law.” A Reconsideration of the Act of State Doctrine in United States Courts, *op. cit. supra*, note 34, at 3. This seems an overstatement; there would appear to be an obligation to recognize a foreign act of state which is unexceptionable on any of the usual grounds, e.g. is not contrary to the public policy of the forum, does not relate to property or persons not within the foreign state. See Falk, *op. cit. supra*, note 34, at 31. But see Comment g to Article 41, Restatement, *Foreign Relations Law*, p. 134 and *Banco Nacional de Cuba v. Sabbatino*, 32 U.S.L. Week 4229, 4235 (Mar. 23, 1964).

³⁶ Mann, *op. cit. supra*, note 32, at 55. See also Comment b to Article 41, Restatement, *Foreign Relations Law*, p. 129.

explicable in terms of "the generally accepted principle of private international law that the transfer of tangible property is subject to the *lex rei sitae* * * *." ³⁷ Private international law furnishes no rule where criminal jurisdiction is involved, but the general recognition in international law of the primacy of territorial jurisdiction suggests a parallel approach.³⁸

Where the criminal or tort liability of the agent of a foreign state is involved, the application of the doctrine is again in a sense indirect. *Underhill v. Hernandez* ³⁹ is said, however, to have established that in the American view the agent of a foreign state does enjoy immunity—in that case from tort liability—for acts done in the performance of his official duty,⁴⁰ since the defendant at the time of suit was no longer an agent of the foreign state, Venezuela. The English view is said to be to the contrary.⁴¹ But even if the decision in *Underhill v. Hernandez* is read as predicated immunity on the official character of the defendant's act, the question remains whether this does not depend on the fact the act was done in Venezuela, not the United States, since the court's rationale for its decision was "the immunity of individuals from

³⁷ Mann, *op. cit. supra*, note 32, at 56.

³⁸ That criminal jurisdiction may exist on other bases, e.g., nationality, would seem not to destroy the parallel, since nationality is normally considered a secondary basis for jurisdiction and in any event is not the exclusive basis. The common limitation on the exercise of jurisdiction on this basis that the act must also be a crime where it occurs approaches though it does not quite reach recognition that the law of the territorial state "governs the legal relationship concerned."

³⁹ 168 U.S. 250 (1897).

⁴⁰ "It would appear that in the United States the basis of this immunity is *ratione materiae* rather than *ratione personae* and therefore immunity persists in respect of earlier official acts after an official no longer holds office. See Harvard Research Draft Convention on "Diplomatic Privileges and Immunities," Article 18, A.J.I.L. Supp. 97 (1932); *Hatch v. Baez*, 7 Hun. 596 (N.Y. Sup. Ct. 1876)." A Reconsideration of the Act of State Doctrine in United States Courts, *op. cit. supra*, note 34, at 9, n. 21.

⁴¹ "There cannot be any doubt that in this country, as in most others, the opposite view prevails in practice and theory, and that, accordingly, it is the personal position of the defendant, not the nature of the act the subject-matter of the proceedings, that is of decisive importance. Nevertheless, even in English law there is perhaps a certain inclination in some cases to attribute immunity to the nature of the act." Mann, *op. cit. supra*, note 32 at 47. Mann refers to DiVischer's theory that it is the official act which is entitled to immunity, based on the distinction increasingly drawn between acts of sovereignty and acts done *jure gestionis*.

suits brought in foreign tribunals for acts done *within their own state* in the exercise of governmental authority * * *.”⁴² This is not the same as saying that a question which should be determined by a careful balancing of the interests of states should turn purely on the matter of territorial sovereignty. Rather the suggestion is that, at least where criminal jurisdiction is concerned, the place where the act occurred is of such significance that only if it occurred outside the state seeking to exercise jurisdiction is there any basis for application of the Act of State doctrine, standing alone.⁴³ Here, it should be noted that the notion of the sanctity of Acts of State draws its strongest support from what most would now consider an exaggerated view of the significance of territorial sovereignty.⁴⁴ In the cases following *Underhill*, the American courts have commonly restated the doctrine in terms which include the element that the act occurred in the foreign state.⁴⁵ Of more importance is that “except where constrained by

⁴² 168 U.S. 250, 252 (1897). (Emphasis added.)

⁴³ In the latter case there may still be occasion for balancing the opposing interests of the state concerned, as when the agent of the foreign state, e.g. a member of its armed forces, is a national of another state, and the latter state seeks to exercise jurisdiction on the basis of nationality.

⁴⁴ “The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. * * * The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.” Mr. Justice Holmes in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909).

⁴⁵ *Ricaud v. American Metal Company, Ltd.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *The Claveresk*, 264 Fed. 276 (2d Cir. 1920); *Banco de Espana v. Federal Reserve Bank of New York*, 114 F. 2d 438 (2d Cir. 1940); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir. 1947); *United States ex rel Von Heymann v. Watkins*, 159 F. 2d 650 (2d Cir. 1947); *United States ex rel Steinworth v. Watkins*, 159 F. 2d 50 (2d Cir. 1947); *Pasos v. Pan American Airways*, 229 F. 2d 271 (2d Cir. 1956); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372 (1923); *Salimoff & Co. v. Standard Oil Co. of New York*, 262 N.Y. 220 (1933); see also *A. M. Luther v. James Sagor and Co.*, [1921] 1 K.B. 456. Cf. *Hewitt v. Speyer*, 250 Fed. 367 (2d Cir. 1918), in which the doctrine is stated in terms of “the acts of a foreign nation performed in its sovereign capacity.” But the act in question was the

an international agreement requiring them to give extraterritorial effect to a foreign act of State, * * * United States courts have felt free to deny effect, as inconsistent with the public policy of the forum, to foreign acts of State purporting to affect a person or *res* not within the territorial jurisdiction of the acting State at the time of the act in question. The Act of State Doctrine therefore is concerned only with acts of State operating directly on persons or property within the territorial jurisdiction of the acting State.”⁴⁶ The fighting issue has been whether a court of the forum could deny effect to a foreign Act of State even though it affected a person or *res* within the forum’s territorial jurisdiction, on the ground it was inconsistent with the public policy of the forum. The New York Court of Appeals has felt free to do so,⁴⁷ and the Second Circuit’s decision in *Bernstein v. Van Heyghen Freres Societe Anonyme*⁴⁸ has been severely criticized be-

payment in Ecuador into an account in the Bank of Ecuador of moneys claimed to be subject to a prior lien.

The holding in *Banco Nacional de Cuba v. Sabbatino* was carefully limited, the court stating that “* * * we decide only that the Judicial Branch will not examine the validity of a taking of property *within its own territory* by a foreign sovereign government, extant and recognized by this government at the time of suit * * *.” 32 U.S.L. Week 4229, 4238 (Mar. 23, 1964). (Emphasis added.)

⁴⁶ “A Reconsideration of the Act of State Doctrine in United States Courts,” *op. cit. supra*, note 34, at 425, citing *U.S. v. Moscow Fire Ins. Co.*, 280 N.Y. 286 (1938), *aff’d* 309 U.S. 624 (1940); *Vladikavkazsky Railway Co. v. New York Trust Co.*, 263 N.Y. 369 (1934); *Plesch v. Banque Nationale de la Republique d’Haiti*, 273 App. Div. 224, *aff’d per curiam*, 298 N.Y. 573 (1948). *Bollack v. Societe Generale*, 263 App. Div. 601 (1942); *Zwack v. Kraus Bros. & Co.*, 133 F. Supp. 929 (S.D.N.Y., 1955) *aff’d in part*, 237 F. 2d 255 (2d Cir., 1956).

Mann, *op. cit. supra*, note 32, at 170, 171 states: “If, for one reason or another, an English court were precluded from opposing its principles of justice and morality to foreign acts of State, logic might necessitate the conclusion that foreign confiscatory legislation must also be allowed extra-territorial effect so as to comprise property situate in this country. English Courts have shrunk from arriving at so extraordinary a result.” Mann cites also decisions of the Rumanian and Swedish Supreme Courts.

⁴⁷ *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533 (1953). See also *Vladikavkazsky Railway Co. v. New York Trust Co.*, 263 N.Y. 369 (1943); *Sokoloff v. National City Bank*, 239 N.Y. 158 (1924); *Second Russian Ins. Co. v. Miller*, 297 F. 404 (2d Cir., 1924); *Zwack v. Kraus Bros. & Co.*, 237 F. 2d 255 (2d Cir., 1956); cf. *A.M. Luther v. James Sagor and Co.* [1921] 1 K.B. 456.

⁴⁸ 163 F. 2d 246 (2d Cir., 1947).

cause it did not.⁴⁹ There would seem to be no need to argue that an act which is in violation of its criminal law is contrary to the public policy of a state.

The cases involving tort or criminal jurisdiction with respect to acts of agents of a foreign government committed in the receiving state suggest there is no immunity with regard to such acts merely because they were done in the performance of official duty. The leading case, *Regina v. Leslie*,⁵⁰ concerned the master of an English merchant vessel who, under a contract with the Chilean government, carried certain Chileans, banished by the Chilean government, from Valparaiso to Liverpool. The court drew a sharp distinction between the performance of official acts within and without the territory of the state of which the defendant was an agent,⁵¹ and affirmed a conviction for false imprisonment for detaining the deportees after the vessel left Chilean waters. On virtually identical facts, involving a deportation from Hawaii, by order of President Dole, on a British vessel, the Divisional Court of British Columbia held the captain and owner liable in tort.⁵² A

⁴⁹ " 'Acts of State' Immunity," 57 *Yale L.J.* 108 (1947). But see *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845, 859, (2d Cir., 1962). Reversed on other grounds, 32 U.S.L. Week 4229 (Mar. 23, 1964).

⁵⁰ Court of Criminal Appeals, 1860, 8 Cox Crim. Cas. 269 (1860); Restatement (Second), *Conflict of Laws*, par. 43 f, Comment f, Illustration 7 (Tent. Draft No. 3, 1956) is expressly to the contrary.

⁵¹ "We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government, and under its authority. * * * The further question remains, can the conviction be sustained for that which was done out of the Chilean territory? and we think that it can. It is clear that an English ship on the high seas, out of any foreign territory, is subject to the laws of England, and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil. * * * [F]or an English ship the laws of Chile out of the state are powerless and the lawfulness of the acts must be tried by English law." *Regina v. Leslie*, *supra*, note 50, at 277-78. But see *Rex v. Secretary of State for Foreign Affairs* [1947] 2 All E.R. 550, [1947] Ann. Dig. 69 (No. 23). Compare *Dick v. United States Lines Co.*, 38 F. Supp. 685 (S.D. N.Y., 1941), holding a seaman could properly be confined by the ship's officers in a foreign port at the direction of officials of the littoral state.

⁵² *Cranstoun v. Bird*, [1896] 4 B.C. 569. The Court said, at 581-82:

"The admission can mean no more than this, that a lawful order was made in Hawaii to carry the plaintiff in a lawful manner to Vancouver, and in an Hawaiian ship the order might probably have been lawfully carried out. No international law, as it seems to me, has any operation on the

dictum in *Vavasseur v. Krupp* is to the same effect, distinguishing a case involving a personal sovereign from one involving his agents.⁵³

Across the board, there is too much authority to the contrary to warrant the conclusion that there is a general rule of international law, based on such abstract principles as the equality and independence of States, according immunity to any agent of a foreign government for any act done in the performance of duty. Where the immunity is recognized, it appears to be based primarily—as is personal immunity—on the need to protect the agent in the performance of his functions, and, indirectly, the state he serves in the conduct of its affairs. One factor in that quite flexible concept appears to be the status of the agent, so that personal immunity and immunity for official acts in a sense overlap. A second basic for the immunity may be fairness, i.e., the feeling that it is unfair to place a man in the dilemma of having to choose between conflicting duties.

The Vienna Convention on Diplomatic Relations accords immunity to certain officials not entitled to personal immunity.⁵⁴ It is clear, however, that this is not responsive to a view that a general rule of international law requires this result. Rather it

case. An English captain of an English ship outside Hawaiian jurisdiction commits a trespass, and Hawaiian law or acts of that Government cannot justify the trespass in an English court. No doubt in an Hawaiian court it would or might be otherwise, and this shows that *Buron v. Denman*, 2 Ex. 167, has no application."

⁵³ German shells, said to infringe English patents, were brought into England by the Mikado to be placed on a Japanese warship. The patentee obtained an injunction against the agents of the Mikado restraining them from removing the shells. The Mikado applied to be made and was made a defendant and an order was issued that, notwithstanding the injunction, he could remove the shells. Brett, L. J., in the course of his opinion, said: "If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue." *Vavasseur v. Krupp*, [1878] 9 Ch. D. 351, 358.

⁵⁴ Article 38 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, provides that:

"1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that state shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.

was motivated by the opinion that there is a functional basis for according the immunity.⁵⁵ Moreover, immunity even for acts done in the performance of official duty is expressly negatived in other instances. This is clear recognition that no rule of international law requires according the immunity to all officials of a foreign government.⁵⁶

The foregoing suggests, as guidelines in appraising the claim that a member of an armed force is entitled to personal immunity, these considerations:

(1) There is no general rule according personal immunity to the agents of a foreign state, and the great majority of such agents enjoy no immunity.

(2) There is a discernible tendency to limit immunities of agents of a state to those necessary, in a quite strict sense, to the exercise of their functions, and there is a correlative emphasis on waiver.

(3) The established immunity of diplomats accredited to a state is of limited significance as an analogy because; (a) it has deep historical roots, including the discredited fiction of extra-territoriality of embassies; (b) it depends in part on accreditation and its corollaries, which provide an independent sanction; and (c) it depends largely on the peculiarly close relationship between the diplomat and the state to which he is accredited.

Regarding the claim that an agent of a foreign state is entitled

⁵⁵ Commentary (c) to Article 37 of the Draft Articles on "Diplomatic Intercourse and Immunities," *Report, International Law Commission*, U.N., 10th Session, 28 April-4 July, 1958. G.A., 13th Session, Supp. No. 9 (A/3859), notes that: "The majority * * * considered it essential for a diplomatic agent who is a national of the receiving state to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions * * *."

⁵⁶ Article 38 of the Vienna Convention on Diplomatic Relations, *supra*, note 8, provides:

"2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State."

But those not nationals or residents of the receiving States who are members of the administrative and technical staffs of a mission enjoy personal immunity, and members of the service staff immunity in respect of acts performed in the course of their duties. (See also Article 37 of the Convention.)

to immunity with respect to acts done in the performance of duty, the situation is much less clear. There is some doubt that the Act of State doctrine extends to acts done outside the state of which the accused is an agent, and in any event the reach of the doctrine is likely to be limited strictly in terms of the need for protecting the agent in the performance of his duties.

CHAPTER III

JURISDICTION OVER MERCHANT VESSELS AND SEAMEN

Theoretical discussion of the bases of criminal jurisdiction and immunities therefrom can be misleading. The type case that readily comes to mind is likely to be one in which virtually all the relevant considerations support the claim of a state to jurisdiction, or support the claim the accused is immune, e.g., an American student at the Sorbonne disturbs the peace of Montmartre, or an ambassador exceeds Maryland's speed limit.

Situations in which each of two or more states has a reasonable basis for claiming jurisdiction and for contesting that of any other state better illuminate the way in which conflicting interests have been balanced, and self-restraint exercised, in reaching acceptable solutions. One such situation which has arisen many times is that of a merchant seaman who commits a crime in a foreign port. Because a parallel may exist between a case of this sort and that of a member of the crew of a warship who commits an offense in a foreign port, it is appropriate to review briefly the way in which jurisdictional conflicts involving merchant seamen have been resolved.

Merchant vessels by their nature and by the activities in which they engage invite jurisdictional controversy.¹ A ship may fly the flag of one state, be manned by officers and seamen drawn from one or several other states, carry passengers of varying nationalities, and be owned by a national of yet another state. Also, a ship on a single voyage may transit the high seas, the territorial waters of other states, and dock in foreign ports. The flag it flies is recognized as determining the status of the ship for jurisdic-

¹ "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If * * * the courts of each were to exploit every such contact to the limit of its power, * * * a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." Mr. Justice Jackson, in *Lauritsen v. Larsen*, 345 U.S. 571, 581 (1953).

tional purposes.² The flag state is recognized as having jurisdiction, and normally exercises jurisdiction, with respect to crimes committed on a vessel on the high seas.³ It was at one time common to rationalize this result by speaking of the vessel as a part of the territory of the flag state. This fiction is rejected in some quarters⁴ but it is acknowledged that the flag state's jurisdiction is as extensive as though the ship were a part of its territory.⁵ The Supreme Court has described the jurisdiction as partaking "more of the characteristics of personal than of territorial

² See Articles 5, 6, 10, 11 of the Convention on the High Seas, 13 UST 2312, TIAS 5200. Flags of convenience (or necessity) may undermine this approach but *McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963) and *Incres Steamship Co., Ltd. v. International Maritime Workers Union*, 372 U.S. 24 (1963) reaffirm the traditional doctrine. The right to assert jurisdiction based on ownership or control is questioned by Hyde: "[T]he legislative action of the United States has amounted in substance to a claim that American ownership or control of vessels under foreign registry may be creative of a right of jurisdiction over ships that must, in point of 'nationality,' be regarded as foreign to itself. The soundness of the American claim, which is not understood as yet to have been challenged in an international forum, may be fairly questioned, especially if applied to the conduct of alien occupants on account of acts committed when such vessels are on the high seas." 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 802 (2d ed. rev. 1947).

³ 1 Hyde, *op. cit. supra*, note 2, at 805. Colombos, *International Law of the Sea*, 257 (4th ed. 1959).

⁴ "Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag state, but apply the law of the flag on the pragmatic basis that there must be some law on ship-board, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." *Lauritsen v. Larsen*, 345 U.S. 571, 585 (1953). The rejection of the fiction in *Chung Chi Cheung v. King*, *infra*, page 169, as to warships necessarily involves its rejection as to merchant vessels. See *Rex v. Gordon-Finlayson*, [1941] 1 K.B. 171.

⁵ "A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so." *S.S. Lotus*, Publications P.C.I.J., ser. A, No. 10, at 25 (1927). Colombos, *op. cit. supra*, note 3, at 247 criticizes the statement as affected by the theory of territoriality of a merchant vessel. See also *Case of Ernest and Prosper Everaert*, Tribunal Correctionnel de Dunkerque, France, Jan. 4, 1936, [1935-1937] Ann. Dig. 262 (No. 110).

The flag state does not have exclusive jurisdiction over the offense of piracy, but historically and otherwise piracy seems clearly *sui generis*.

sovereignty”⁶ and a leading text writer has described it as “a jurisdiction over the persons and property of its citizens.”⁷ Both phrases suggest that the ship is viewed as an entity to which a status may appropriately be assigned for purposes of jurisdiction. A ship, employed as a unit in a business enterprise, is in a very real sense such an entity. Both safety at sea and the success of the enterprise, which depend on the prompt carriage of passengers and cargo and a minimum time spent in port, require an efficient organization and strict discipline, which ultimately must be sanctioned by the law of some state.⁸ The complexity of a ship, moreover, requires officers and seamen with varied, complementary skills. The loss of any one of the officers or seamen may hamper or cripple the operation of the ship. A replacement may be hard to find, particularly in a foreign port. These factors support, though historically they may not have prompted, recognition of the competence of the flag state.⁹

⁶ *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923). The comment was made with reference to the holding that the 18th Amendment did not extend to American merchant vessels outside the waters of the United States although in terms its scope was “The United States and all territory subject to the jurisdiction thereof.” See also *Aderhold v. Menefee*, 67 F. 2d 345 (5th Cir. 1933). Cf. *Casale and Donati Case*, Court of Cassation (Chambre Criminelle), France, Jan. 9, 1937, [1935-1937] Ann. Dig. 247 (No. 102).

⁷ “The jurisdiction which a State may lawfully exercise over vessels flying its flag on the high seas is a jurisdiction over the persons and property of its citizens, it is not a territorial jurisdiction.” Colombos, *op. cit. supra*, note 3, at 247.

⁸ “States make certain rules for providing ships with their nationality and authorizing them to fly their flags. There is therefore an intimate connection between the ship and the State whose nationality she acquires which carries with it the application to the ship of the laws of the flag-State. It is under these laws that the captain exercises his authority and enforces it.” Colombos, *op. cit. supra*, note 3, at 249.

⁹ Charteris, “The Legal Position of Merchantmen in Foreign Ports and National Waters,” [1920-1921] *Brit. Yb. Int'l. L.* 45, 73, quoting in part from Hall, *International Law* 212 (7th ed., 1917), refers to the considerations “that the crew form ‘part of an organized body of men, governed internally in conformity with the laws of the state, enrolled under its control and subordinated to an officer who is recognized by the public authority,’ and that the exercise of local jurisdiction over them may involve detention of the ship, and even the loss of skilled assistance not always easy to replace.”

“The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and

Jurisdiction being conceded normally to be in the flag state when a vessel is on the high seas,¹⁰ the theoretical basis for the

by common consent is applied to the case of chattels of such a very special nature as ships." Judge Finlay, dissenting in the *S.S. Lotus, Supra*, note 5, at 53. See also Judge Loder's comment, note 10, *infra*.

"* * * [T]here is a mutual disposition on both sides not to exert it [jurisdiction] in a way which will interfere with the proper discipline of the ships of either nation. If every complaint of any individual of the crew of a vessel against the officers for ill-treatment is to be taken up by the civil authorities on shore, and these officers prosecuted as criminals, commercial intercourse will be subjected to very great annoyance and serious detriment." Secretary March to Mr. Crampton, British Minister, April 19, 1856, M.S. Notes to Great Britain, VII, 524, 2 Moore, *International Law Digest* 290 (1906).

¹⁰ Article 6, Convention on the High Seas, *supra*, note 2; Colombos, *op. cit. supra*, note 3, at 257. Recognition of the jurisdiction of the flag state when a vessel is on the high seas is, of course, further supported by the consideration that no other state has a readily discernible basis for asserting jurisdiction. "A merchant ship being a complete entity, organized and subject to discipline in conformity with the laws and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty upon the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State." Judge Loder, dissenting, in the *Lotus Case, supra*, note 5, at 39.

The state of which a seaman or passenger is a national may assert at least a subsidiary competence as to his conduct. "It is submitted that a State whose subjects are on board a foreign ship can appreciate as it thinks fit and attach what consequences it likes to such acts, provided that in so doing it does not exclude or supplant the primary jurisdiction of the State whose flag the vessel flies * * *.

"In all cases, however, where such persons have fallen into the hands of the territorial authorities of their own State, there appears to exist no doubt that the local Courts are entitled to exercise jurisdiction." Colombos, *op. cit. supra*, note 3, at 259, 264. See also Hall, *International Law* 308 (8th ed., 1924). Both writers discuss the incident of Anderson, an English sailor on board an American vessel who stabbed the mate on the high seas, and was tried and convicted by a British court when the vessel docked in Calcutta, giving rise to a controversy between Great Britain and the United States. Hall observed of the British position that "Probably * * * the claim to strictly concurrent jurisdiction is excessive." See 1 Moore, *International Law Digest* 932, 935 (1906).

Colombos, *op. cit. supra*, note 3, at 267, summarizes the situation with the statement: "On the whole question, there is weighty and preponderant opinion in favour of the rule that jurisdiction in respect of crimes committed on board merchant vessels on the high seas is primarily vested in the Courts of the flag-State of the vessel, but that such jurisdiction is not exclusive and that the State whose national is accused of a crime on board

jurisdiction may be considered unimportant.¹¹ This ceases to be true, however, when a ship enters the territorial waters or docks at a port of another state. It was never helpful, in this context, to refer to a conflict of two "territorial" jurisdictions. In fact there has been an effort, not yet entirely successful, to allocate jurisdiction on the basis of a more precise definition of national interests. Acts committed on board a vessel passing through the territorial waters of another state, in exercise of the right of innocent passage, take place within the territory of the littoral state. Where such acts and their effects are confined to the vessel, the interest of the littoral state is not, however, readily discernible, and "* * * it is so unusual for a local court to take cognizance of such affairs that an attempt to do so might well be considered as officious meddling and probably contrary to the customary rules of international law."¹² In brief, in such instances the interests of navigation and commerce clearly predominate. Where, however, the act takes effect outside the vessel, e.g., in collision cases, the littoral state may properly assert jurisdiction.¹³

When a criminal act takes place on a ship in a foreign port a more complex problem is raised. The lines which have been drawn in allocating jurisdiction with respect to such acts are instructive as to the interests which states are moved to defend.¹⁴

a foreign ship is competent to try him when he is within its jurisdiction, although such jurisdiction is not generally exercised."

Some states assert jurisdiction where an offense is committed on board a foreign merchant vessel against one of their nationals—a much more doubtful proposition.

¹¹ Except in collision cases, e.g., the *S.S. Lotus*.

¹² Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* 122 (1927). But see Article 19, Convention on the Territorial Sea and the Contiguous Zone, adopted April 27, 1958, U.N. Doc. A/CONF. 12/L.52, 38 *Dept. of State Bulletin* 1111, 1113, and Article 49(2), Restatement, *Foreign Relations Law*, at 164.

¹³ Thus, Jessup points out that the British Territorial Waters Jurisdiction Act of 1878, passed after the British courts had held they had no jurisdiction over the captain of a German vessel whose ship was in collision with a British vessel in British territorial waters, was a proper assertion of jurisdiction. Jessup, *op. cit. supra*, note 12, at 122. See also Colombos, *op. cit. supra*, note 3, at 276.

¹⁴ "These modifications are justified by the fact that the interests of the littoral State are more directly affected by the presence of a foreign vessel in its ports than by her passage through its territorial waters." Colombos, *op. cit. supra*, note 3, at 279.

Where others than the crew are involved, the assistance of the local authorities is asked,¹⁵ or the peace of the port is disturbed,¹⁶ the littoral state has a right, superior to that of the flag state, to assert jurisdiction. Where, however, only internal discipline¹⁷ or acts participated in only by the crew and not disturbing the peace of the port are involved, the littoral state does not normally assert jurisdiction. Rather such cases are commonly left to the flag state. The flag state may, moreover, exercise jurisdiction in any case if the territorial state does not choose to, and the United States, among others, does so as to certain offenses.¹⁸

The only significant difference of opinion in this area relates to

¹⁵ *Public Prosecutor v. Kristian Kalsen*, Tribunal Correctionnel of Nantes, France, April 2, 1937 [1935-1937] Ann. Dig. 210 (No. 79).

¹⁶ Article 53 of the Restatement, *Foreign Relations Law*, at p. 178, states that the coastal state: "* * * (a) waives the right to exercise its enforcement jurisdiction * * * with regard to matters involving the internal management and discipline of the vessel and with regard to criminal conduct aboard the vessel, unless

(i) the consequences of the crime extend to the coastal state or
(ii) the crime is of a kind to disturb the peace of the port * * *."

The United States has conceded priority of jurisdiction to the territorial state in other than the excepted cases. See the instances cited in 2 Hackworth, *Digest of International Law*, 212-213 (1941). For the British position, see Charteris, *op. cit. supra*, note 9, at 72-73.

¹⁷ Gidel suggests that infractions of discipline which do not at the same time constitute crimes "*de droit commun*" concern only the flag state, and that the littoral state has no jurisdiction with respect to them. 2 Gidel, *Droit International Public de la Mer* 200, 201 (1934). See *In re Schultz*, Supreme Court, Costa Rica, Dec. 26, 1939, [1938-1940] Ann. Dig. 169 (No. 65).

¹⁸ See *United States v. Flores*, 289 U.S. 137 (1933), overruling a demurrer to an indictment for murder committed by an American on an American vessel while it was at anchor in the Port of Matadi, in the Belgian Congo.

"* * * The right of a nation to punish offenses committed on its vessels, national or private, which for most purposes are considered as part of the national territory, is also admitted. Such offenses, it has been held, may be punished by the vessel's sovereign, even when they were committed on a merchant vessel in the ports of another sovereign, provided the latter did not take jurisdiction." Moore's Report, 1887 *U.S. Foreign Relations* 757, 771. See also *Regina v. Anderson* [1868] 11 Cox Crim. Cas. 198 (Cr. App.), affirming the conviction of an American seaman for manslaughter committed on a British vessel in the Garonne River, 45 miles from the sea; *The Queen v. Carr* [1882] 10 Q.B. 76; *In re Nocita*, Court of Cassation, Italy, July 6, 1938, [1938-1940] Ann. Dig. 297 (No. 98); 2 Gidel, *op. cit. supra*, note 17, at 249.

the basis for this allocation of competence between the littoral and the flag state. There are two approaches, the Anglo-American and the French, each of which has other adherents. Neither relies on the fiction of extraterritoriality, which would exclude the jurisdiction of the littoral state altogether. The Anglo-American theory rather asserts the primacy of the jurisdiction of the littoral state in all cases, and explains the priority in fact accorded the flag state in certain cases as a concession which the territorial state may grant or withhold in its discretion, case by case.¹⁹ The French position, which stems from the *Avis du Conseil d'Etat* of November 6, 1806,²⁰ is said, on the other hand, to be predicated on the position that international law requires the littoral state to accord immunity where only internal discipline or acts participated in only by the crew and not disturbing the peace of the port are involved.²¹ Gidel asserts this is a misinterpretation of the

¹⁹ In *Wildenhus's Case*, 120 U.S. 1 (1887), a treaty was involved, but the court referred (p. 12) to the "comity" by which "it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged * * *."

"A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of consideration of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion." *Cunard Steamship Company, Ltd. v. Mellon*, 262 U.S. 100, 124 (1923).

²⁰ Quoted in full in translation by Charteris, *op. cit. supra*, note 9, at 51.

²¹ Jessup concludes (as does Charteris, *op. cit. supra*, note 9, at 56-61) that "* * * even though one accepts the theory that the French rule posits certain definite limitations upon the jurisdiction of the local state, it can scarcely be said that this view has received such general acceptance as to make it a rule of international law." He argues that the acceptance in France of the moral disturbance theory, which implies that the local court may determine for itself whether an incident has affected the peace of the port, precludes saying that a foreign vessel may claim immunity as of right. Jessup, *op. cit. supra*, note 12, at 193-94.

Gidel agrees that, although the approach of the *Avis* has been widely adopted, it cannot be said there is a rule of international law making that approach obligatory. 2 Gidel, *op. cit. supra*, note 17, at 247. See also the

Avis. He insists that the Avis recognizes the primacy of the littoral state's jurisdiction in all cases other than those involving pure matters of discipline; that the French approach differs from the Anglo-American only in that it calls for the littoral state to indicate in advance the class of cases in which it will forego exercising its jurisdiction.²² It seems agreed, however, that whatever the difference in the theoretical approach, the line drawn by both groups of states is in practice much the same.²³

The nationality of the seamen is not a factor in the allocation of jurisdiction between the flag state and the territorial state. The flag state may exercise jurisdiction over seamen of any nationality,²⁴ and there is substantial support for the view that the nationality of the seamen²⁵ should in no case affect the allocation of jurisdiction. The United States, when it exercised extraterritorial jurisdiction in the Orient, asserted the right both to protect and to try seamen on American vessels, even for offenses on land, regardless of their nationality,²⁶ even nationals of the territorial state.²⁷ This at least suggests that the true basis for the assertion

Reporters' Notes to Article 53 of the Restatement, *Foreign Relations Law*, at 180.

²² 2 Gidel, *op. cit. supra*, note 17, at 204-05; 208-09; 220-21; 246-47.

²³ Colombos, *op. cit. supra*, note 3, at 248.

²⁴ See *Regina v. Anderson*, [1868] 11 Cox Crim. Cas. 198 (Cr. App.). *The British Merchant Shipping Act*, 1894, 57 and 58 Vict., c. 60, sec. 687, applies to offenses "either ashore or afloat" by any seaman who at the time "or within three months previously has been, employed in any British ship * * *."

²⁵ 2 Gidel *op. cit. supra*, note 17, at 210; see also Mr. Fish, Secretary of State, to Mr. Schneck, March 12, 1875, [1875] *U.S. Foreign Relations* 592 and 2 Moore, *op. cit. supra*, note 9, at 295-97, relating to jurisdiction with respect to internal discipline, citing an instance in which United States Commissioners at New Orleans were instructed not to exercise jurisdiction in a dispute involving American sailors on a British vessel in that port.

²⁶ See 2 Moore, *op. cit. supra*, note 9, at 605-12; Hinckley, *American Consular Jurisdiction in the Orient* 87 (1906); *In re Ross*, 140 U.S. 453 (1891). Hall, *Foreign Powers and Jurisdiction of the British Crown*, 141-42 (1894), took the position that the flag state had protective but not punitive jurisdiction over seamen of other nationalities in treaty states.

²⁷ "Chinamen employed as seamen on American ships have the status of American seamen, even in Chinese waters, 1892 *U.S. Foreign Relations* 243. A Japanese seaman on an American naval vessel was held subject to American consular jurisdiction in 1882 for a crime committed in Japan: *In re Ikeda Tome Kicki*, Seedmore, U.S. Courts in Japan, 229." Hinckley, *op. cit. supra*, note 26, at 88. But Japan challenged American jurisdiction (Mr. Gresham, Secretary of State, to Mr. Dun, Minister to Japan, Nov. 29, 1894,

of jurisdiction by the flag state is the protective principle rather than the nationality principle. The fiction of nationality becomes particularly thin, of course, when a ship sails under a flag of convenience, and no member of the crew is a Panamanian, Liberian or the like.

Any exemption from the local jurisdiction is, however, limited to incidents involving only the crew, and does not apply where passengers²⁸ or strangers to the vessel are the offenders or, seemingly, the victims.²⁹ This approach confirms the conclusion

and Dec. 8, 1894, M.S. Inst. Japan IV 226, 228, 2 Moore, *op. cit. supra*, note 9, at 609, and the issue was left undecided; it should be noted that the incident cited by Hinckley involved a sailor on a naval vessel.

²⁸ In the recent case of *Complaint of Mikkelson*, France, Court of Cassation (Criminal), June 12, 1952, 48 A.J.I.L. 164 (1954), one alien was accused of criminal defamation of another on a Norwegian vessel in a French port. The Court of Cassation held "that the famous opinion of the *Conseil d'Etat* of Nov. 20, 1806, did not exclude the jurisdiction of the littoral state when the crime was committed either by or against a person who was not a part of the ship's company, even if the public order of the littoral state was not disturbed by the offense. French nationality of the victim was in no way prerequisite for jurisdiction." Charteris, *op. cit. supra*, note 9, at 73 states: "On principle they (passengers) become subject to the law prevailing on the ship on which they embark, but as they perform no function in the navigation, they do not appear to be properly subject to the considerations which, on the French view, make for the immunity of the ship's company from the territorial jurisdiction, * * *." See also 2 Gidel, *op. cit. supra*, note 17, at 211-213, citing the *Cordoba*, in which one German passenger killed another on board a foreign vessel anchored in Dunkirk. The French authorities were appealed to, but the court, in condemning the accused, also indicated that the affair was outside the rule leaving jurisdiction to the flag state when the crew was involved. And see Jessup, *op. cit. supra*, note 12, at 151.

²⁹ "There should be included in the same juridical category (as passengers) the persons, not passengers on the foreign vessel, who find themselves on board for one reason or another; the criminal acts committed by such persons, if they do not constitute pure and simple infractions of discipline, or against such persons, are subject to the competence of the territorial authorities." 2 Gidel, *op. cit. supra*, note 17, at 213, citing *The Nymphaea*, Trib. Bordeaux, in which the court said that "in all other cases, and notably when the offence has been committed by or against a person not a member of the crew, the French penal law is always applicable."

The fact that a stranger to the vessel is not a national of the littoral state does not preclude that state from taking jurisdiction. Jessup, *op. cit. supra*, note 12, at 150, citing the *Cassa*, in which a French court took jurisdiction where two Syrian seamen assaulted two other Syrians, residents of Marseilles, on board an Austrian vessel at anchor in Marseilles.

that the interests of commerce and navigation—rather than any notions of extraterritoriality—are at the root of the exemption of seamen. Those interests prevail only when there are no substantial conflicting interests of the littoral state. They never prevail, of course, when the offense occurs on shore, regardless of who is involved. The interests of the littoral state are then clearly dominant.

It is perhaps implicit in what has been said that a merchant vessel in a foreign port is in no sense inviolable. The littoral state unquestionably has enforcement jurisdiction on the vessel,³⁰ although it seems to be agreed also that the flag state may exercise some measure of enforcement jurisdiction on the vessel.³¹

There is seemingly no precedent with regard to members of the family of a member of the crew.

³⁰ See Comment f to Article 49 of the Restatement, *Foreign Relations Law*, at 166; 2 Moore, *op. cit. supra*, note 9, at 855; see also Charteris, *op. cit. supra*, note 9, at 85, for a discussion of the *Marie Luz*, in which the Emperor of Russia, as arbitrator, sustained the right of the Japanese authorities to release coolies being carried from Macao to Peru on a Peruvian vessel which put into Yokohama under stress of weather, and, at 75, of the Anglo-German controversy over the right of the British to arrest passengers on German ships putting into British ports who were fugitives from British justice. Disputes have arisen primarily over the right to give asylum to political offenders.

³¹ Article 32 of the Restatement, *Foreign Relations Law*, states at p. 92 that "A state has jurisdiction, as to rules within its jurisdiction to prescribe, to enforce them (a) aboard a vessel or aircraft having its nationality while under the control of its commanding officer * * *." Comment b to Article 33 notes that the flag state may exercise such jurisdiction in a foreign state as of right only in the case of a vessel in innocent passage; in other circumstances such jurisdiction may be exercised only with the consent, express or implied, of the territorial state. Comment c states that "The enforcement action that a state may take in the territory of another state includes only arrest and detention in the case of merchant vessels." Article 49(3), at p. 165, relating to Vessels in Passage, states that the flag state's enforcement jurisdiction is limited "to detention or such other interim enforcement measures as the internal management or discipline of the vessel requires." Comment g to that Article states, at p. 167, that the flag state's enforcement jurisdiction may be exercised "* * *" only to a limited extent dictated by the necessities of discipline and internal management of the vessel. For this purpose, detention of the person charged with the crime and minor disciplinary measures are sufficient. Should the crime be such as to require a trial and the imposition of more than minor disciplinary sanctions, the coastal state need permit no more than detention of the offender so that such trial and punishment can take place after the vessel is outside its territory.

The implications of the allocation of jurisdiction with respect to merchant vessels are worth noting. They are:

(1) The allocation is made not by rigid adherence to an absolute principle, e.g., territorial sovereignty, but by a more subtle balancing of the opposing interests of the littoral and flag state.

(2) Primacy is clearly given the interest of the littoral state, since it is recognized as having a superior basis for asserting jurisdiction: (a) Where the peace of the port is disturbed, even though the disturbance is only moral;³² (b) Where passengers or

Usually, this means that the offender will be brought back for trial and punishment to the territory of the state of the flag of the vessel." Article 53 (b) states at p. 179 that the territorial state "consents to the exercise by the foreign state of its jurisdiction * * * to the extent necessary to detain on board the vessel a person with respect to whom the coastal state does not exercise its jurisdiction," and Comment c states at p. 180 that Comment f to Article 49 is equally applicable to Article 53 (b).

See also Colombos, *op. cit. supra*, note 3, at 258.

Hall, *Foreign Powers and Jurisdiction of the British Crown* (1894), describes the jurisdiction of British Consuls, and of the "naval court" which could be summoned in situations beyond the competence of a consul or in which he desired assistance, and notes that "the jurisdiction exercised by consuls and naval courts shows that accused persons may be held in custody, may be tried and sentenced to imprisonment or lesser penalties, and may be sent in custody out of the territorial jurisdiction, either for the purpose of being tried or of undergoing punishment." (pp. 78-79). He notes also that "Persons are no doubt frequently sent on shore from ships to a consulate in custody, but in such cases there is obviously at least tacit consent on the part of the territorial authorities. Adversely to such authorities it cannot be done." (p. 79, footnote).

The Allied Powers (Maritime Courts) Act, 1941, 4 & 5 Geo. 6, c. 21 (May 22, 1941) authorized certain allies of Great Britain to establish Maritime Courts in the United Kingdom to try persons, not being British subjects, for certain offences, including "any act or omission committed by any person on board a merchant ship of that Power." Sec. 2 (1). But Sec. 3 (1) provided that "Nothing in this Act shall deprive any British court of jurisdiction in respect of any act or omission constituting an offence against the law of any part of His Majesty's dominion," and the exercise of jurisdiction was subject to certain other restrictions and limitations. These make the major premise abundantly clear that without such express statutory authorization there would have been no right to establish the courts. See Colombos, *op. cit. supra*, note 3, at 268.

³² The Supreme Court, in *Wildenhus's Case*, *op. cit.*, note 19, stated at 18:

"It is not alone the publicity of the act, or the noise and clamour which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it be-

strangers to the vessel are involved, that is, where the offense is not *inter se*; and (c) With respect to all acts which occur on shore.

(3) No interest of the flag state other than that its commerce should not be unduly burdened is recognized and what will unduly burden such commerce is narrowly construed.

(4) The nationality of the members of the crew is not a factor.

(5) The interests of the members of the crew as individuals, in where they are to be tried, by whom, and under what legal system, are not at least expressly recognized as having any bearing on the allocation of jurisdiction.

comes known, it is a 'disorder' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a 'disorder' which will 'disturb tranquility and public order on shore or in the port.'"

See also *People v. Wong Cheng*, 46 P.I. 729 (1922) holding that smoking opium on an English ship anchored 2½ miles from shore was punishable under Philippine law; *United States v. Look Chaw*, 18 P.I. 573 (1910) holding that possession of opium in similar circumstances was not; and *Ministère Public v. Kuti Gomes*, Mixed Court of Appeal, Cairo, Egypt, June 13, 1938, [1938-1940] Ann. Dig. 167 (No. 63), holding that having possession of and attempting to sell hashish on a British ship in Port Said was punishable under Egyptian law.

That moral disturbance of the peace of the port is sufficient to give the littoral state a superior claim to jurisdiction is apparently accepted by the French and Italians. In the *Tempest* case (Jessup, *op. cit. supra*, note 12, at 147-48) the Court of Cassation in 1859 stated that the local authorities were properly concerned "when the act is of a nature to compromise the tranquility of the port, or when the intervention of the local authority is requested, or when the act constitutes a common law crime of such gravity as not to permit any nation to leave it unpunished." Jessup notes that on the facts this was dictum, but that it has seemingly been fully accepted in France. See also Gidel's comment on the *Tempest*, 2 Gidel, *op. cit. supra*, note 17, at 216-17. With respect to the Italian view, see also Jessup, at 156-57, citing the *Redstar*.

Comment b to Article 53 of the Restatement, *Foreign Relations Law*, states, at p. 179, that: "The ["peace of the port"] doctrine does not refer to breach of the peace as such. Rather, it is usually interpreted to allocate the exercise of enforcement jurisdiction to the coastal state in those cases, relatively infrequent, in which the seriousness of a crime compels the coastal state to deal with it."

CHAPTER IV

WARSHIPS AND THEIR CREWS

THE BASES OF IMMUNITY

In a sense it is artificial to discuss the status of the crews of warships separately from that of land forces. Visits of warships to foreign ports have, however, been common in time of peace as well as war; on the other hand, visits of land forces on foreign territory have been relatively rare. Hence jurisdictional problems involving seamen have arisen much more frequently and judgments regarding appropriate solutions can be predicated on the extensive comments of text writers, judicial decisions and the practice of states. Again, the rules of international law governing the status of the crews of warships have developed quite independently, without much reference to the problems of land forces. This development has, moreover, been influenced, to a degree not easily measured, by concepts and analogies (e.g., the fiction of extraterritoriality and the status of merchant seamen) which have played a lesser or no discernible role in the formulation of the rules with respect to land forces. This independent development may on the whole have been unfortunate since a higher degree of cross-pollination perhaps could have contributed to more satisfactory solutions in both areas. There are nevertheless marked differences between the situation of the crews of warships in foreign waters and ports and that of land forces on foreign territory. These differences suggest that variations in the rules governing status may be desirable. It seems on the whole better to deal first with the status of the crews of warships, but to postpone extended discussion of some of the issues raised to later chapters.

In foreign territorial waters and ports, warships and their crews enjoy more extensive exemptions from the jurisdiction of the littoral state than do merchantmen and their crews—exemptions that are properly described as immunities. Both the bases for and the range of these immunities are, however, disputed.

The fiction of extraterritoriality enjoyed as great a vogue with

respect to warships as with respect to embassies and was influential in shaping the law. The fiction has been vigorously attacked, and was expressly repudiated by the Privy Council with respect to a public vessel.¹

Rejection of the fiction of extraterritoriality by no means implies there are no sound bases for the immunities of warships and of their crews. It does, however, require a more searching inquiry into the factors which may support those immunities.

¹ The fiction is supported by Oppenheim, 1 Lauterpacht-Oppenheim, *International Law* 853 (8th ed. 1957), but the editor notes the decision of the Privy Council in *Chung Chi Cheung v. The King*, [1939] A.C. 160 (Pr. Council), 108 L.J.R. 17, a prosecution in a Hong Kong court for the murder of the captain of the Chinese Maritime Customs cruiser *Cheung Keng*, an armed public vessel, by a cabin boy when the vessel was in Hong Kong territorial waters. Both the captain and cabin boy were British nationals. In dismissing the cabin boy's appeal and holding that the Hong Kong court had jurisdiction on the ground that China had waived its jurisdiction, after noting the opposing views, that the immunity of warships is based on extraterritoriality or that "the immunities do not depend on an objective extraterritoriality, but on implication of the domestic law," it was said at 167:

"There Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries."

After reviewing the authorities bearing on the point, the opinion continued:

"Their Lordships have no hesitation in rejecting the doctrine of extraterritoriality * * * which regards the public ship 'as a floating portion of the flag-State.' However the doctrine of extraterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating-island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore." *Id.* at 174.

More than a century before, in *Forbes v. Cochrane* [1824] 2 B & C 448 at 467 Best, J., in discussing the liability of certain British naval officers for refusing to restore slaves who had escaped to their ships from Florida, said:

"I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man of war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves, were free." Cited, 2 Moore, *International Law Digest*, 578 (1906).

It has been said that "The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the state for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from the local jurisdiction."² This can be read to mean that a warship and its crew are so much an entity that their immunities necessarily have the same origin, nature, and scope. On the other hand, it can be read to mean that a warship and its crew serve functions so interdependent that there can be no adequate basis for an immunity for either if the situation does not involve some connection between vessel and crew. The latter, it is submitted, is the only acceptable sense in which the statement quoted may be read.

A warship is a physical instrumentality of the state, designed, as a plane, tank or gun is designed, to make the use of force available in international disputes. The crew is an organized body of men, brought together, trained, and subjected to a common command and discipline to perform an assigned mission, sailing and fighting the ship. The warship gives form and substance, in terms of function, to the concept of a crew, as planes, guns and tanks do to the concept of an air force or an army. The crew's function is nevertheless separate and distinct from that of the warship, however interdependent those functions may be. Further, the immunities of a warship and of its crew can hardly be of the same nature and scope. A warship is incapable of committing a crime, though it may be the scene of a crime or the instrument with which a crime is committed, e.g., a violation of the navigation laws. The only question of immunity which can arise with respect to a warship is by whom enforcement action may be exercised aboard her. Members of the crew may, however, commit crimes, on board or ashore, in the performance of duty or as private acts. Those acts may concern the flag state, the littoral state, or even the state of which the accused or the victim is a national. One should not limit in advance the analysis and appraisal of the possible reasons for according immunities to a warship and to its crew by the assumption they must have the same origin, nature and scope.

² Hall, *International Law*, 249 (8th ed., 1924). See also 2 Gidel, *Droit International Public de la Mer*, 267 (1934).

Three reasons, or groups of reasons, have been assigned for the immunities commonly claimed for warships and their crews. These are in essence the same as those advanced for the immunity of land forces. They will be discussed at greater length later, but need to be mentioned here. The first reason stems from the ideas of the representative character of a warship, the independence of states and the mutual respect of sovereigns.³ Although there is force in these ideas, it varies depending on whether one is speaking of the warship or of its crew. A warship is a public vessel, the property of a state, and as such may be said in a sense to have a representative character.⁴ If this alone is not persuasive—and there is much recent authority that it is not—there are other factors. It is also an instrumentality designed for and devoted to one of the highest interests of the state, its security. If the independence of states, not as an abstract principle but in substantial terms, requires that any instrumentality of a state must be free from foreign interference, it is a warship. Reference to the mutual respect of sovereigns is less convincing with regard to a warship, though one can look upon it as a symbol, as the flag it flies is a symbol, of the state, to which respect is required.

The same ideas have a quite different impact with respect to the crew. The captain and, in lesser degree, the other officers and the seamen are representatives of the flag state, exercising delegated powers. It cannot be said, however, that the independence of states or the mutual respect of sovereigns requires that every representative of a state, regardless of his capacity and activity, is entitled to immunity. Perhaps it could be argued that the captain should be considered as entitled to immunity in terms of these concepts, but as to the other officers and the seamen this seems much more doubtful.

The second reason given for the immunities of warships and their crews is military exigency, which is said to require that the flag state retain complete control over the vessel and its crew.⁵ The compelling character of this argument, applied to the war-

³ See 2 Gidel, *op. cit. supra*, note 2, at 265.

⁴ "We must observe here, with Wharton's commentator, Mr. Dana, that the immunities enjoyed by warships depend more on their public character than on their military character. They are accorded not to a warship but to a national ship, vested as such with a certain character of sovereignty." 1 Calvo, *Le Droit International* 613 (3d ed., 1880).

⁵ See 2 Gidel, *op. cit. supra*, note 2, at 266, and the authorities there cited.

ship, is evident. The threat to the security of the flag state would be real and substantial if the authorities of a foreign state could come on the vessel at will and exercise authority, necessarily in derogation of the commander's. Their mere presence on the warship could, because of the classified character of much of what is found on a warship, endanger the flag state's security. What is less clear is that military exigency requires the flag state to retain exclusive control over the crew, both in their official and unofficial activities. While it is true that the flag state must retain the power to enforce discipline, free of the interference of the littoral state, it is far from obvious that subjecting the crew to the criminal jurisdiction of the littoral state, at least with respect to their unofficial activities ashore, necessarily involves an intolerable interference with the flag state's control.

A third reason sometimes relied on for the immunities commonly claimed is the implied consent of the littoral state, but, as Gidel remarks, this can hardly serve as an independent reason since, unless a reason of substance exists, there can be no reason for implying consent to any immunity.⁶

Against these factors, which argue for the immunity of warships and their crews, are to be weighed the reasons—in other circumstances generally recognized as compelling—for acknowledging the jurisdiction of the territorial state—"the paramount necessity," as the court said in the *Chung Chi Cheung* case, "for each nation to protect itself from internal disorder by trying and punishing offenders within its borders."⁷

IMMUNITY OF THE SHIP

A warship on the high seas is completely immune from the jurisdiction of any state other than the flag state,⁸ and much the same appears to be true of a warship passing through territorial waters. A warship, as a physical object, is likewise completely immune from the enforcement jurisdiction of the littoral state when in a foreign port, insofar as ordinary proceedings are concerned.⁹ "No legal proceedings can be taken against her either for

⁶ *Ibid.*

⁷ *Supra*, note 1, at 167.

⁸ Colombos, *International Law of the Sea*, 221 (4th ed., 1959); Hall, *op. cit. supra*, note 2, at 307. See Article 8, Convention on the High Seas, 13 UST 2312, TIAS 5200.

⁹ This was the specific point involved in *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812), although there the vessel entered in distress. Chief

recovery of possession, or for damages for collision or for a salvage reward, or for any other cause.¹⁰ More important for present purposes, the littoral state may not exercise enforcement jurisdiction in any form on the vessel without the consent of the commanding officer.¹¹ This is true whether the act which occa-

Justice Marshall, in holding the warship immune, said (p. 143):

"But in all respects different, is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference can not take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality."

¹⁰ 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 853. See also 2 Hackworth, *Digest of International Law* 409 (1940-4); Colombos, *op. cit. supra*, note 8, at 194-5; Art. 15, "Resolutions, Institute of International Law," 34 *Annuaire* 475. Hall points out that the doubt raised regarding the English rule by remarks of Lord Stowell in *The Prins Frederik* (1820), 2 Dodson 484 and by Sir R. Phillimore in *The Chariek*, L.R. 4 Admiralty and Ecclesiastical Cases 93, were set at rest by the decision in *The Constitution* (1879), L.R. 4 P.D. 39, refusing an application for a warrant for the arrest of that American frigate and her cargo for a salvage claim, after the American government objected to the exercise of jurisdiction and the objection was supported by counsel for the crown. Hall, *op. cit. supra*, note 2, at 248. See also 2 Moore, *op. cit. supra*, note 1, at 579; 1 McNair, *International Law Opinions* 92 (1956) opinion of 1871. Oppenheim remarks at p. 853 (footnote) that "this rule became universally recognized only during the nineteenth century."

The Restatement, *Foreign Relations Law*, Sec. 67, affirms the rule but notes that the littoral state may assert a diplomatic claim.

¹¹ Surprisingly enough, this rule, which may now be regarded as firmly established, was at one time seriously questioned, particularly by the United States. The Attorney General ruled in 1794 that a writ of *habeas corpus* could be awarded where it was alleged an American subject was unlawfully detained on a British warship in an American harbor. Bradford, Attorney General, 1794, 1 Op. 47, 2 Moore, *op. cit. supra*, note 1, at 574. Moore's account cites Hall, for whose report of the same incident see Hall, *op. cit. supra*, note 2, at 238-9. Again in 1799, the then Attorney General ruled that civil or criminal process might be served upon a person on board a British warship lying in New York harbor. Lee, Attorney General, 1799, 1 Op. 87, 2 Moore, pp. 574-5. Lawrence notes that: "These views were by no means confined to American lawyers. They seem to have been held by authorities of the highest repute in England. * * * Such doctrine as these

sions the assertion of jurisdiction took place on the vessel or ashore, and whether it was committed by an officer or member of the crew or a stranger to the vessel.¹² The right of a warship to

[Lord Stowell's] would reduce the immunities of a public vessel almost to vanishing point. They would never probably have been acquiesced in on the continent of Europe. * * *

Lawrence, *Principles of International Law*, 226-7 (7th ed. 1923). See also Hall, pp. 240-1.

Chief Justice Marshall's opinion in *The Schooner Exchange* resulted, however, in a reversal of the American position, and was undoubtedly largely responsible for the now seemingly general recognition of the view that enforcement jurisdiction may not be exercised on a foreign warship. See 2 Moore, *op. cit. supra*, note 1, at 578-79.

Hyde states that "At the present time a foreign vessel of war and the occupants thereof are acknowledged to be exempt from local process." 2 Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 826 (1945). The Restatement, *Foreign Relations Law*, Section 52, states the rule with a minor qualification. "Except as otherwise expressly indicated by the coastal state, its consenting to the visit of a foreign naval vessel * * * implies that it (a) waives the right to exercise aboard the vessel its enforcement jurisdiction * * * except to the extent necessary to prevent imminent injury to persons or property not involved in the operation of the vessel * * *."

The British authorities are reviewed by Hall, *op. cit. supra*, note 2, pp. 243-44. His conclusions are somewhat more guarded, since the British position has not been entirely uniform. He notes that the French, German and Italian authorities support the complete immunity of warships from enforcement jurisdiction. Oppenheim states flatly that "No official of the littoral state is allowed to board the vessel without special permission of the commander." 1 Lauterpacht-Oppenheim, pp. 853-54. See also Colombos, *op. cit. supra*, note 8, at 227. And see 1 McNair, *op. cit. supra*, note 10, at 90, opinion of April 24, 1860, and at 91, opinion of March 7, 1862, both of which support the immunity but rely on the fiction of extraterritoriality, as do some of the early American authorities cited. See also Article 15 of the "Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports," Institute of International Law, 1898, 17 *Annuaire* 277, and Art. 16 of the "Resolutions of the Institute, 1928," 34 *Annuaire* 214.

United States Navy Regulations 1948, Article 0730, (GPO 1948), provide: "The Commanding Officer shall not permit his command to be searched by any person representing a foreign state nor permit any of the personnel under his command to be removed from the command by such person, so long as he has the power to resist." Cf. Article 0764, relating to examinations by foreign customs and immigration officials.

¹² "No occupant while remaining on board is subject to the local jurisdiction, notwithstanding his infraction of the local criminal code by an act committed on shore or taking effect there. * * * When a fugitive from justice is once received on board of a foreign vessel of war within the territorial waters of a State he is believed to be withdrawn from the local jurisdiction."

give asylum to a fugitive has been much debated, but even if there is no such right, the local authorities are still barred from entering the vessel and taking the fugitive.¹³

The wide recognition of these immunities of a warship suggests that states generally regard the reasons supporting them, summarized above, as conclusive. It is misleading, however, to regard them as immunities from criminal jurisdiction—to which only the last has any relevance in the usual sense. These immunities are better summarized as together making the warship inviolable.

IMMUNITY—ACTS ON BOARD

A. The Crew

Whether the littoral state can extend its criminal law to apply to acts which occur on the warship—granted it may take no steps to enforce its law there—is a more difficult question. Rejection of the fiction of extraterritoriality implies that there is no disability of the littoral state merely because the act takes place on a warship, just as there is no such disability merely because an act occurs in an embassy. Nor does the inviolability of the vessel appear to be a basic factor. Effective enforcement by the

2 Hyde, *op. cit. supra*, note 11, at 826–29. “Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot be forcibly taken off the vessel * * *.” 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 854. See also, *Orfanidis v. Ministère Public*, Mixed Court of Cassation, Egypt, May 31, 1943, [1943–1945] Ann. Dig. 141 (No. 38); *Anne and others v. Ministère Public*, Court of Cassation, Egypt, Dec. 13, 1943, [1943–1945] Ann. Dig. 115 (No. 33); *Ministère Public v. Korkoris*, Court of Cassation, Egypt, Dec. 11, 1944, [1943–1945] Ann. Dig. 120 (No. 34). And see *Ex parte Sulman*, Supreme Court of South Africa, Cape of Good Hope Provincial Division, July 15, 1942, [1941–1942] Ann. Dig. 247 (No. 64), applying the doctrine to a merchant vessel requisitioned by the Netherlands government in wartime.

¹³ “[I]t is wrong for a ship to harbour a criminal or a person charged with non-political crimes. If, however, such a person succeeds in getting on board, and is afforded refuge, he cannot be taken out of the vessel. No entry can be made upon her for any purpose whatever.” Hall, *op. cit. supra*, note 2, at 246.

Article 21, “Resolutions, Institute of International Law,” 1898, 17 *Annuaire* 278, reads: “Whatever shall be the status of persons on board a war-ship, even when they have been wrongly received, if the commander refuses to give them up, force may not be resorted to to ensure their recapture, or visit and search exercised to that end.”

littoral state may require on-the-spot investigation and the right to summon witnesses, both of which may be prevented or made more difficult by the vessel's inviolability. This is at best, however, an argument of a secondary order. Fundamentally the disability, if it exists, must stem from the character of the actors, the nature of their actions, and the relationship of both to the warship, the flag state and the littoral state.

In the sense that the captain and crew of a warship are in general required to obey the local law, there is no general disability of the littoral state to prescribe its application. Specifically, there is no disability, or correlative immunity, with respect to acts which take effect externally to the ship, at least those in the normal range of laws and regulations relating to navigation, anchorage, quarantine, sanitation and the like.¹⁴ When such laws or regulations are violated, the littoral state may apply for redress to the government of the flag state, or, in extreme cases, order the ship out of its territory, or forcibly expel it, but ordinary remedies are not available.¹⁵ Such violations are, of

¹⁴ 2 Hyde, *op. cit. supra*, note 10, at 827, 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 855; Colombos, *op. cit. supra*, note 8, at 227; 2 Gidel, *op. cit. supra*, note 2, at 255. Mr. Hill, Acting Secretary of State, to Secretary of the Navy, Oct. 6, 1899, M.S. Dom. Let. 399, 2 Moore, *op. cit. supra*, note 1, at 514; Memo of Mr. S.C. Lemly, Judge Advocate General, U.S.N., communicated to Mr. Moore, Third Assistant Secretary of State, July 6, 1891, *id.*, p. 584. Hall, *op. cit. supra*, note 2, at 246, affirms the duty to obey such laws and regulations, subject "to the exception, it is probable, of instances only in which there is a special custom to the contrary."

¹⁵ See 1 McNair, *International Law Opinions* 93, 94 (1956), regarding the case of the *Enterprise*, an armed vessel of the United States used as a training ship, which entered a Bermuda harbor and, owing to a misunderstanding, committed a breach of the quarantine regulations. The commanding officer was fined £10 and costs but he protested and the fine was not enforced. The Law Officers to whom the matter was referred expressed the opinion (December 17, 1897) that the vessel and her officers could not claim exemption from the regulations, but "It does not, however, follow that the vessel and her officers are subject to the jurisdiction of the local courts. * * * [I]n our opinion the officer commanding such man-of-war is not liable to proceedings in the local Courts, in respect of any act done by him in the management of the vessel."

"The duty of observing the regulations of the port is one of international obligation. The vessel is admitted on the implied terms of observing such regulations. If they are broken she may be expelled—if such an extreme step be necessary for the safety of the port. Diplomatic representation may be made to the Government of the country to which the vessel belongs, and

course, the acts of individuals rather than of vessels, and the basis of the individuals' immunity is not clear, assuming that any attempt to take enforcement action against them is made on shore. A persuasive argument can be made in terms of military exigency.¹⁶ The same reason, fortified because there is at least no physical disturbance of the peace of the port, supports an immunity with respect to acts done on board in the performance of duty.

Even as to private acts, military exigency may well provide an adequate basis for immunity of the crew. The members of the crew, so long as they are on board, can be said to be so much a part of an organized body of men charged with handling the ship that it would interfere with performance of the ship's mission if the littoral state asserted jurisdiction over their conduct, even

if anything like a right to disregard such regulations were asserted, the foreign Government might be informed that its vessels could not be admitted."

See, generally, Colombos, *op. cit. supra*, note 8, at 227.

¹⁶ The statement made in Comment c, Sec. 35 of Tentative Draft No. 2 of the Restatement, *Foreign Relations Law*: "For the performance of official duties aboard a vessel it is possible that a doctrine of non-liability might develop to prevent the exercise of territorial jurisdiction against certain naval personnel while ashore" is not repeated in the final version. "[C]ourts will not assume jurisdiction over such vessel or its officers, while acting as such, but leave controversies arising out of the acts of the vessel, and its officers, while acting in their official character, for settlement through diplomatic channels." *United States v. Thierichens*, 243 Fed. 419, 420 (D.C.E.D. Pa., 1917).

In *The Owner of the Junk "Tung On Tai" etc. v. Gove*; *The Alexander*, 1 Hong Kong L.R. (1906) 122, 2 Hackworth, *op. cit. supra*, note 10, at 419-20, the United States naval collier *Alexander* was in collision with a Chinese junk in Hong Kong waters. A civil suit against the commander of the *Alexander* was dismissed, upon motion of the Attorney General, on the ground the ship was immune and the immunity extended to the commander. The court said: "* * * I therefore think that the Plaintiff's contention cannot be maintained, and that the principles enunciated in *The Parlement Belge* as applicable to foreign public ships, certainly cover the case of the officers and crew on board, because they are under the control and in the employ of a foreign Sovereign in national objects, and because the jurisdiction of the court, if exercised, must divert their public service from its destined public use * * * This * * * immunity * * * exists only so long as he [the naval officer] forms part of the machine known as a vessel of war, and commits the act of negligence with or by means of such vessel, and when it is either in whole, or in part, under his control. But whether such immunity can be claimed by the officer himself I very much doubt." See also the case of *The Enterprise*, *supra*, note 15.

though at the moment they are not technically on duty, in the four hours on, eight hours off sense, or acting in performance of duty. The fact that an act occurs on board is, in other words, relevant in terms of the military exigency which supports the crew's immunity, even though the crew do not share the warship's immunity. Moreover, the crew while on the vessel are under the direct and immediate command and disciplinary authority of the commander. If any weight is to be given to the argument that the assertion of jurisdiction by the littoral state would interfere with the maintenance of discipline and the exercise of needed control by the commander, it should be in these circumstances. Merchant seamen are, at least on the basis of comity, accorded an exemption in similar circumstances, subject only to the qualification that the peace of the port is not disturbed, no stranger is involved, and the local authorities are not asked to intervene. Cumulatively all of the factors which distinguish members of the crew of a warship from merchant seamen would seem to justify saying that they should be accorded immunity for acts on board the vessel. Presumptively the littoral state has jurisdiction over acts that occur on a warship, as it does over those that occur on a merchant vessel, when the vessels are in its waters. But the same balancing of interests of the flag state and the littoral state which justifies only the according of a qualified exemption for merchant seamen can be said to require the recognition of complete immunity for the crew of a warship.¹⁷

Several writers state categorically that the flag state has exclusive jurisdiction over acts which occur on the vessel,¹⁸ and in

¹⁷ Cf. 2 Gidel, *op. cit. supra*, note 2, at 290-1.

¹⁸ Oppenheim states, 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 854, that "Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities." But it should be remembered that he accepted the fiction of extraterritoriality of warships. Colombos, *op. cit. supra*, note 8, at 234, says that "The commander of a man of war or public ship in a foreign port or waters retains complete jurisdiction over the ship and her crew, thus excluding entirely the jurisdiction of the territorial sovereign. The local jurisdiction is equally excluded in the case of disturbances on board her, these having to be dealt with by her commander alone." Hall, *op. cit. supra*, note 2, is more guarded, saying at 245: "Exceptions to this obligation [to obey the local law] exist, in the case of acts beginning and ending on board the ship and taking no effect externally to her, firstly in all matters in which the economy of the ship or the relations of persons on board to each other are exclusively touched, and secondly to the extent that

Chung Chi Cheung v. King,¹⁹ the court took the same line, though it should be noted that there the crime took place while the vessel

any special custom derogating from the territorial law may have been established,—perhaps also in so far as the territorial law is contrary to what may be called the public policy of the civilized world.” See also 2 Gidel, *op. cit. supra*, note 2, at 292.

Article 16 of the “Resolution of the Institute of International Law, 1898,” 17 *Annuaire* 277, reads: “Crimes and offenses committed on board these ships or on the boats belonging to them, whether by members of the crew, or by any others on board, shall come under the jurisdiction of the courts of the nation to which the ship belongs and shall be judged according to the laws of that nation, whatever be the nationality of the perpetrators or the victims.

“Whenever the commander shall deliver the delinquent over to the local authorities, the latter shall regain the jurisdiction which under ordinary circumstances would belong to them.”

Article 18 of the “Resolutions of 1928,” 34 *Annuaire* 742, reflects, however, a shift in emphasis from jurisdiction to prescribe to jurisdiction to enforce. “Crimes and offenses committed on board warships, whether by members of the crew or by any other persons on board, are withdrawn from the exercise of the competence of the courts of the State of the port, as long as the ship is there, whatever be the nationality of the perpetrators or the victims. Nevertheless, if the commander delivers the delinquent to the territorial authority, the latter shall regain the exercise of its normal competence.” 1 McNair, *op. cit. supra*, note 15, at 94, refers to an 1881 opinion which “advised that a local Italian *pretore* had no right to hold an inquest upon the cause of the death of a British seaman occurring on board a British ship of war while in the port of Naples, though it was his duty, once the body was transferred from the ship to the land, to satisfy himself before permitting burial that the death had not resulted from a crime committed within his jurisdiction on land.”

Tentative Draft No. 2 of the Restatement, *Foreign Relations Law*, states that “The question whether officers and crewmen are subject to enforcement jurisdiction while on shore with respect to conduct aboard a vessel is one not answered by authoritative decisions or precedents from state practice.” Sec. 35, Comment c, at 107. This is not a statement that the jurisdiction exists, and the officers and crew are not immune, but it does suggest that the question is open and the absence of such jurisdiction in the littoral state cannot be assumed. The statement is not repeated in the final version of the Restatement.

¹⁹ *Supra*, note 1. The court said at 174, 176: “Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assaults another on board, it would be universally agreed that the local courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag-nation. * * * In the present case the question arises as to the murder of one officer and the attempted murder

was in the territorial waters of Hong Kong, not in port. The issue has been debated whether the littoral state can claim at least concurrent jurisdiction where the accused or the victim or both are, though members of the crew, nationals of the littoral state. The weight of authority on this issue supports the view that nationality is not a relevant factor.²⁰

of another by a member of the crew. If nothing more arose the Chinese Government could clearly have had jurisdiction over the offense * * *." See also *The Lone Star*, Supreme Federal Court, Brazil, Nov. 22, 1944, [1947] Ann. Dig. 84 (No. 31).

²⁰ Hall appended a footnote to the comment quoted, note 18, reading: "The case which, however, would be extremely rare on board a ship of war, of a crime committed by a subject of the state within which the vessel is lying against a fellow subject, would no doubt be an exception to this. It would be the duty of the captain to surrender the criminal." Literally, the qualification suggested is applicable to members of the crew as well as strangers to the vessel.

As so read, the qualification was rejected in the *Chung Chi Cheung* case, *supra*, note 1, at 176, where both the murderer and the victim were British subjects: "It is difficult to see why the fact that either the victim or the offender, or both, are local nationals should make a difference if both are members of the crew."

The court quoted at 172 from the memorandum of Sir Alexander Cockburn, Lord Chief Justice, included in the "Report of the Royal Commission on Fugitive Slaves," 1876, Command 1516, p. xiii:

"The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject * * * the criminal * * * should be given up to the local authorities."

The court commented that "[T]he Lord Chief Justice assumed that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial court would have jurisdiction. Their Lordships doubt whether, when he was dealing with the case of a crime committed on board of a local subject, he had present to his mind the possibility of the local subject being a member of the crew."

Hall's comment posited the case where both the criminal and the victim were subjects of the littoral state, and that was the actual situation in *Chung Chi Cheung*. The case in which the criminal only is a subject is, of course, weaker, and that in which the victim only is a subject is weaker still.

See also 2 Gidel, *op. cit. supra*, note 2, at 292: "If the author of the un-

B. Strangers

No reason suggests itself why a stranger to the vessel who commits an offense aboard a warship in a foreign port should enjoy any immunity from the jurisdiction of the littoral state. Fundamentally, the littoral state has jurisdiction on the territorial principle, and an affirmative reason must exist to deprive it of its competence. The fact the place of the offense was a foreign warship hardly seems adequate, unless one reverts to the fiction of extraterritoriality. No such immunity is recognized with respect to visitors to a merchant vessel or an embassy, and no interest of the flag state is apparent which would justify giving strangers to a warship a superior status. Recognition of an obligation of the commander to deliver such an offender to the local authorities seems desirable,²¹ although the flag state should be recognized as having a secondary competence.

lawful act is a member of the crew, the flag state has exclusive jurisdiction. The quality of member of the crew predominates over all other circumstances, even if the individual author of the offense is a national of the riparian state."

²¹ Writers have on occasion either drawn no distinction between the crew and others on board, or considered both entitled to the same immunity. De Martens, however, argued long ago that:

"No juridical reason exists for declaring that in all cases crimes committed on warships are excluded from the jurisdiction of the local authorities. One can admit that the commander of the ship and the crew should not be subject to such authorities. But for what reason should this privilege be extended to individuals who, forming no part of the crew, have committed a crime on board a warship? The extraterritoriality of such ships, thus understood, would become up to a certain point contrary to their own security and would be in opposition to the rights and the dignity of States in whose water they sailed." 2 De Martens, *Traite de Droit International* 337 (1886).

He notes that the opinion expressed was not that of the majority of writers on international law, but it has the support of Gidel, *op. cit. supra*, note 2, at 293-4, although Gidel would recognize the concurrent jurisdiction of the flag state where the victim was a member of the crew.

Colombos takes the position, *op. cit. supra*, note 8, at 234, that: "If a crime is committed on board a warship by a person not a member of the ship's crew and not belonging to her, the commanding officer may with propriety hand the accused over to the local authorities, but he cannot be compelled to do so. The only exception appears to be in the case of a crime committed on board the warship by a national of the territorial State against a fellow-subject. In such a case, which must be extremely rare, it would be the duty of the commander to surrender the criminal to the local authorities," citing Article 18 of the Stockholm resolutions, see footnote 18,

IMMUNITY OF THE CREW—ACTS ON SHORE

Any blanket of immunity that the officers and crew of a warship may enjoy on board does not cover them on shore. All of the crew of a warship, including, seemingly, the commander, are subject to the jurisdiction of the littoral state while ashore in pursuit of their private interests.²² The only dispute is over

supra. It is submitted that the obligation of the commander to deliver the offender to the local authorities should be recognized in all cases, on the territorial principle alone, without requiring reinforcement either from the nationality or the passive personality principle. So long as it is recognized that the littoral state can not exercise enforcement jurisdiction on the vessel—breach of the commander's obligation to deliver the accused could be sanctioned only through diplomatic channels—the interests of the flag state would appear to be adequately safeguarded.

The court in *Chung Chi Cheung v. King*, *supra*, note 1, at 174, recognized the jurisdiction of the territorial state, but did not comment on the duty of the commander to deliver the offender to the local authorities, saying:

"But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods, and identify the offender, the local courts would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance or otherwise. He naturally would leave the case to the local courts. * * * The result of any such doctrine [extraterritoriality] would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships or embassies to go unpunished."

Article 9 of the *Montevideo Treaty on International Penal Law* of March 19, 1940 provides: "If only individuals who are not members of the crew of the war vessel or aircraft participate in the commission, on board, of such acts, the trial and punishment shall proceed in accordance with the laws of the State in whose territorial waters the vessel or aircraft is found." See *The Lone Star*, *supra*, note 19.

United States Navy Regulations 1948 provide in Article 0732:

"1. The commanding officer shall keep under restraint or surveillance, as necessary, any person not in the armed services of the United States who is found under incriminating or irregular circumstances within the command, and shall immediately initiate an investigation.

* * * * *

"3. If the investigation indicates that such person has committed or attempted to commit an offense punishable under the authority of the commanding officer, the latter shall take such action as he deems necessary."

²² "The officers of a vessel of war belonging to a friendly foreign nation can not set up extraterritoriality when unofficially on shore in a port in

whether they are subject to such jurisdiction while ashore in a duty status.

whose harbor their vessel is temporarily moored." 2 Moore, *op. cit. supra*, note 1, at 585, citing Mr. Randolph, Secretary of State, to Mr. Hammond, July 23, 1794, 7, M.S. Dom. Let. 55; Mr. Buchanan, Secretary of State, to Mr. Leal, Brazilian chargé, August 30, 1847, S. Ex. Doc. 35, 30 Cong. 1 sess. 29, *id.*, at 586, concerning the arrest in Rio de Janeiro of a lieutenant and three sailors of the U.S.S. *Saratoga*, when one man "drew his knife on his fellow sailor whilst on shore." "* * * any person * * * attached to such man of war, charged with an offence on shore, is liable to arrest therefor, in the country where the offence may have been committed." Mr. Fish, Secretary of State, to Commodore Case, January 27, 1872, 92 M.S. Dom. Let. 322, 2 Moore, p. 588; the *Forte*, 5 Moore, *International Arbitrations* 4925-28 (1898), 2 Moore, *op. cit., supra*, note 1, at 587, in which Leopold of Belgium, as arbitrator, held for Brazil in a dispute with Great Britain over the arrest of a chaplain, lieutenant and midshipmen of the *Forte* ashore in Brazil. See also *Japan v. Smith and Stinner*, High Court of Osaka (Sixth Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 22 (No. 47), in which Japan asserted jurisdiction over British sailors from the warship *Belfast* for an offence committed ashore, although the warship had been engaged in action in Korean waters until just before her visit to Kobe.

Of particular interest is the incident reported in 2 Hackworth, *op. cit. supra*, note 10, at 422, citing Ambassador O'Brien to Secretary Knox, telegram of June 5, 1911, and Mr. Knox to Mr. O'Brien, telegram of June 7, 1911, M.S. Department of State, file 394.112 At S/-, 3. Hackworth's report states:

"On June 5, 1911, the Ambassador in Japan reported to the Department of State the murder of one United States naval enlisted man by another in a United States naval hospital ashore. The Ambassador stated that he informally requested of the Japanese Foreign Office that American naval officials be allowed to take jurisdiction, but that the request had been refused. The Department, on June 7, 1911, instructed the Ambassador that 'Unless the practice of other nations is contrary, you should concede jurisdiction to Japan, at the same time indicating that this Government would prefer by courtesy to try the prisoner.' The man was later tried and convicted by a Japanese court."

It should be noted that both the murderer and his victim were Americans and enlisted men in the Navy; it does not appear from the report, but the murderer may have been on duty; and, finally, the murder occurred in a United States naval hospital. See also Colombos, *op. cit. supra*, note 8, at 236; 2 Gidel, *op. cit. supra*, note 2, at 297.

See the discussion regarding the status of the commander, 2 Gidel, pp. 299-300, citing the comments of other writers. It is Gidel's conclusion that one can not demonstrate the existence of a custom giving special status to the commander, and his judgment that the commander should, in principle, be equally subject to the local jurisdiction. See *United States v. Thierichens*,

Such respected authorities as Hyde²³ and Hall²⁴ would deny the immunity even in this case, but other writers—perhaps the

243 Fed. 419 (D.C.E.D. Pa., 1917), in which the defendant was the commanding officer of the German cruiser *Prinz Eitel Friedrich*.

The Restatement, *Foreign Relations Law*, Comment c to Sec. 52, p. 177, states that "The rule stated in this Section has no application to the personnel of a vessel while they are ashore," and Illustration 3, following the Comment, states that the captain of a naval vessel is subject to the enforcement jurisdiction of the littoral state if he "negligently kills Z while driving a car on shore in the course of making an official call."

²³ "The exemption enjoyed by persons officially connected with and on board of a foreign public vessel does not accompany them after they have left the ship or its tenders and are on shore. * * *."

"Officers and crews of foreign vessels of war, who commit offenses while ashore, are generally subject to local prosecution. * * *."

"Possibly the commander of a vessel of war who goes ashore in order to accomplish an end directly connected with or incidental to the public business which brought his vessel into the port, ought not, while so engaged, to be amenable to local process, provided he does not, in the course of his errand, violate the local law. It is believed he should not, for example, be arrested for an offense committed during a previous visit, or be served with process in a civil suit charging him with tortious conduct at any prior time. It is not known, however, that such an exemption within the limits stated has been claimed or granted by the United States." 2 Hyde, *op. cit. supra*, note 10, at 830. No reason is advanced for the suggested distinction between past and present offenses.

See also the Restatement, *Foreign Relations Law*, Comment c to Sec. 52, and Illustration 3, p. 177.

²⁴ Hall, *op. cit. supra*, note 2, at 249. But an editor's footnote says: "Opinion on this point is divided. Some writers adopt the rule stated in the text unqualifiedly. (J.B. Moore, Dig. II Sec. 256; Hannis Taylor, Sec. 261; Hyde, *International Law*, i, Sec. 255). Others modify it by requiring notification of the arrest of a member of the crew to the ship's commander and giving him the power of demanding that local jurisdiction shall be so exercised as to meet the requirements of moral justice, e.g., through consular intervention (Ortolan, *Dip. de la Mer*, i, 268; Phillimore, i, Sec. 346). Others draw a distinction between the purposes for which the landing took place; if it were for an object connected with naval duty, the members of the crew should be immune; if for some other object, such as recreation, he should not be (Perels, 121-5; Bonfils, Sec. 620). This appears to be the view of most writers (Oppenheim, i, Sec. 451). The case of the *Forste* is inconclusive. * * * The practice in Great Britain appears to be that in case of serious offences the offender is dealt with by the local authorities, but in case of minor offences, such as drunkenness, the offender is simply detained until he can be handed over to a superior officer of the ship to which he belongs, but this is done as a matter of courtesy."

majority—would recognize it.²⁵ The former have the support of a majority of the Supreme Court of Canada,²⁶ the latter of the Mixed Court of Cassation of Egypt, though these decisions can be distinguished because they arose in wartime.²⁷

²⁵ "The position of officers and crew when ashore is not quite free from doubt. The practice generally followed is to apply the principle of extritoriality to them when they are on land in uniform and in an official capacity connected with the service of their ship. But if they are ashore not in uniform or on official business, they are subject to the territorial jurisdiction of the littoral State, which is entitled to prosecute them for any crimes against the local laws. In the case of minor offences, it is usual to hand over, on grounds of international comity, the wrongdoers to the commanding officer for him to deal with, but there is no obligation to do so." Colombos, *op. cit. supra*, note 8, at 236. Oppenheim notes that "the position of the commander and crew of a man-of-war in a foreign port when they are on land is controversial. The majority of writers distinguish between a stay on land in the service of the man-of-war and a stay for other purposes." 1 Lauterpacht-Oppenheim, *op. cit. supra*, note 1, at 855.

²⁶ Sir Lyman P. Duft, C.J.C., with whom Hudson, J., concurred, concluded:

"The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship." *Reference Re Exemption of U.S. Forces from Canadian Criminal Law* [1943], 4 D.L.R. 11, 25. Rand, J., concurred on this point. *Ibid.*, p. 51.

²⁷ *Triandafilou v. Ministere Public*, Mixed Courts in Egypt Court of Cassation, June 29, 1942, 39 *A.J.I.L.* 345. Triandafilou, a Greek subject, was a sailor on the torpedo boat destroyer *Panther* of the Greek fleet anchored in Alexandria. He came ashore to purchase food for the needs of the ship, with permission to return on board by midnight. On coming out of a bar on the Place Mohamed Aly in a state of intoxication some minutes before midnight, he struck with a dagger an agent of the local police who, with the purpose of calming a disturbance which had broken out among other persons, was about to conduct such other persons to the station.

The court noted that it was pertinent "to distinguish between the immunity which the vessel itself enjoys, as representing the country whose flag it flies, and the personal immunity which the crew would enjoy, 'by way of an extension,' which would result in withdrawing the crew to a greater or less degree from the territorial jurisdiction even when they had gone on land * * *." After commenting on the conflict among writers, noting Art. 20 of the "Resolutions of the Institute," which "can be considered as stating

The language of the Mixed Court of Cassation that "it is in short the immunity of the vessel which projects itself beyond the vessel for the realization of its own ends" may have been unfortunate. It appears to mean simply that so long as members of the crew are on duty, even though they may be on shore, there is a functional basis for their immunity. This is a position for which support can be found. The immunities of diplomats are of even wider scope, and are said to be justified on a functional basis. The opposing view need not depend on the theory the warship and crew are one, and cannot be immune when physically separated. It can stem from the belief that compelling military need for the immunity of the crew can exist only if they are on the warship. At least it can be said that the primary functions of the crew are performed on board, and the military need for their immunity is more clearly discernible when they are on board.

Gidel makes the point that the difficulties of determining whether an act was an act "de service" may explain why immunity for such acts on shore has not had wider support.²⁸ Later decisions of the Mixed Courts of Egypt, limiting the doctrine of the *Triandafilou* case that "these words should be interpreted not

the latest holding of international law on the subject" and denying that, as a member of a visiting force, the accused was protected by any general immunity, either under international law or because of the Anglo-Egyptian treaty, the court said that "the sole question which presents itself * * * is that of knowing whether Triandafilou was or was not carrying out a mission under instructions at the moment when he committed the aggression * * *." In deciding that he was, and ordering Triandafilou set at liberty, it said:

"Whereas if the members of the crew of a warship enjoy the immunity from jurisdiction of the vessel itself when they are on shore this is only true in so far as they can be considered as agents for executing orders which are given them in the interests of the vessel; whereas it is in short the immunity of the vessel which projects itself beyond the vessel for the realization of its own ends; whereas such is the basis of the principle which withdraws them from the local jurisdiction when they are on duty; whereas it follows that these words should be interpreted not with reference to the activities of him who has received the order but with reference to him who has given the order and who must take cognizance of its execution; and whereas in the instant case the sailor Triandafilou did not return on board to give an account of his commission, and whereas he was therefore still on duty when he committed the aggression with which he was charged; whereas it results from these considerations that the first ground for the appeal is well founded. * * *"

²⁸ 2 Gidel, *op. cit. supra*, note 2, at 295.

with reference to the activities of him who has received the order but with reference to him who has given the order," illustrate the difficulty.²⁹ There is a discernible distinction—though one not always easy to draw in a given situation—between an act done while on duty and one done in the performance of duty. The exercise of criminal jurisdiction by the receiving state in the latter situation involves a much more direct interference with the sending state's conduct of its affairs, and poses the dilemma of conflicting duties for the actor. There is need, then, for more precise analysis before the conflicting interests of the sending and receiving state can be weighed. It should not be forgotten, however, that a criminal offense on shore creates more than a moral disturbance of the peace of the port, so that the littoral state has a greater interest in asserting jurisdiction than if it takes place on the vessel.³⁰

It has been pointed out that a party of sailors on duty ashore may have the status of an "organized force" of "friendly force," with whatever added claim to immunity this may entail.³¹ The

²⁹ *Gounaris v. Ministère Public*, Egypt, Mixed Court of Cassation, May 10, 1943 [1943-1945] Ann. Dig. 152 (No. 41).

³⁰ No distinction is apparently made on the basis of the nationality of the victim, but in practice this may be crucial. Thus: "In September 1926, when a seaman of the U.S. destroyer *Sharkey* died in England as a result of wounds received in a shooting affray with another seaman of the U.S. destroyer *Lardner* in the outskirts of Gravesend, the British Government consented, on the application of the American Ambassador in London, and as a matter of international courtesy, to hand over the culprit to the American authorities, although he had already been convicted by a coroner's jury of 'wilful murder.' In the statement issued by the Home Secretary, the opinion of the British Government was expressed that 'in the special circumstances of this case, a United States tribunal would be the more convenient Court,' particularly in view of the 'assurance given by the Ambassador' that the guilty person would be dealt with in accordance with the U.S. Navy Court-martial Regulations. 'In coming to this decision, the Secretary of State had in mind the fact that both the accused and the injured seaman belonged to the U.S. Navy and that no British subject was directly concerned.'" Colombos, *op. cit. supra*, note 8, at 236.

³¹ Hyde states (2 Hyde, *op. cit. supra*, note 10, at 830), that "If a body of sailors under the command of an officer is permitted to land as an organized force, as for the purpose of taking part in a local parade, the members are doubtless exempt from the local jurisdiction, not, however, on account of their connection with a public vessel, but because they constitute an organized force of a foreign State permitted to enter the national domain,"

distinction between such a party and an individual sailor ashore on duty is significant, particularly if the specific consent of the littoral state to the landing of the party, e.g., a shore patrol, is required. This should not, however, be viewed as an odd reinvocation of the doctrine of extraterritoriality. An individual sailor on shore on duty may or may not be entitled to immunity. In the appraisal of his claim, however, he should not be likened to a soldier, stationed with his unit in France, who crosses into Switzerland. The warship and the members of the crew on shore are still in the same state, and when it becomes relevant, that fact should be accepted.³²

The flag state can certainly extend its law to conduct on board its warships, even in foreign ports.³³ Direct authority with respect to its right to exercise enforcement jurisdiction aboard such ships is hard to come by, but certainly it is no less extensive than on merchant vessels and may well be greater.³⁴ Enforcement jurisdiction may not, however, in any case be exercised on shore without the consent of the territorial sovereign. Such jurisdiction is in fact exercised by consent in many instances but only to curb minor excesses, and the authority of the local police is in no sense superseded.³⁵ The disability applies particularly to the

citing, *inter alia*, the *Tampico Incident*, 2 Hackworth, *op. cit. supra*, note 10, at 420-21.

The Reporter's Notes to Sec. 52 of the Restatement, *Foreign Relations Law*, p. 178, take the same approach, though the conclusion is different.

³² See Gidel's comment on the views expressed by Van Praag, 2 Gidel, *op. cit. supra*, note 2, at 296.

³³ 1 Hyde, *op. cit. supra*, note 10, at 800.

³⁴ Sec. 52, p. 176, of the Restatement, *Foreign Relations Law*, states that: "Except as otherwise expressly indicated by the coastal state, its consenting to the visit of a foreign naval vessel * * * implies that it * * *

(b) consents to the exercise by the foreign state of such of its enforcement jurisdiction * * * as is necessary for the internal management and discipline of the vessel."

Comment (e), p. 177, states that "The exercise by the state of the vessel, of the enforcement jurisdiction that it has * * * is limited to detention, the inflicting of minor punishment or the holding of summary courts martial. It does not include the inflicting of major punishment such as the death penalty."

United States Navy Regulations 1948, Article 0732, contemplate the exercise of limited enforcement jurisdiction on the vessel even with respect to strangers to the vessel. *Op. cit. supra*, note 21.

³⁵ "For reasons of courtesy and expediency, a usage has arisen permitting foreign officers to seize and take on board their ships, without obstruction,

arrest of deserters, since, at least if they are not apprehended in the act of deserting they can be said to have broken, *de facto*, their link to the warship.³⁶

members of crews who have become intoxicated and whose offences have not been directed against persons or property ashore. * * * 2 Hyde, *op. cit. supra*, note 10, at 831.

"In the ports of all countries where foreign men-of-war resort, when sailors go ashore, become intoxicated and violate police regulations by quarreling with brother sailors—especially where they have insulted or injured none of the citizens of the country—their officers are always permitted to seize them and take them on board without obstruction, unless they have been first apprehended by the police. This is a custom, founded on courtesy, among all nations." Mr. Buchanan, Secretary of State, to Mr. Leal, Brazilian chargé, Aug. 30, 1847, S. Ex. Doc. 35, 30 Cong. 1 Sess. 28, 32; 2 Moore, *op. cit. supra*, note 1, at 589.

The *United States Navy Regulations 1948* are strict and explicit. Article 0625 provides for shore patrols "to maintain order and suppress any unseemly conduct on the part of any member of the liberty party. The senior patrol officer shall communicate with the chief of police or other local officials and make such arrangements as may be practicable to aid the patrol in properly carrying out its work.

2. *A patrol shall not be landed in any foreign port without first obtaining the consent of the proper local authorities.* Tact must be used in requesting the permission, and unless it is willingly and cordially given, the patrol shall not be landed. If consent cannot be obtained, the size of the liberty parties shall be held to such limits as may be necessary to render disturbances unlikely. (Emphasis added.)

3. Officers and men on patrol duty in a foreign country shall be unarmed * * *."

Article 0622 provides:

"1. The senior officer present shall * * * respect the territorial authority of nations in amity with the United States.

2. Unless permission has been obtained from the local authorities:

(a) No armed force * * * shall be landed."

³⁶ "Should any members of the crew desert in a foreign port, the commanding officer must not attempt to arrest them ashore; to do so would be a violation of the jurisdiction of the local sovereign." Colombos, *op. cit. supra*, note 8, at 237, citing the case in 1905 in which the commander of the German gunboat *Panther* sent on shore in Brazil a search party composed of twelve petty officers and sailors in uniform, together with three officers in plain clothes, who entered several houses and forced some of the local inhabitants to help in the search for a missing seaman who had not returned from leave on shore. Brazil protested and Germany disavowed the commander's acts.

Hyde observes that "For reasons of courtesy and expediency, a usage has arisen permitting foreign officers * * * to exercise the customary authority for the maintenance of discipline over seamen, remaining ostensibly within

Writers have differed in the weight they have given precedents regarding the crews of warships in situations involving land forces. If the approach taken emphasizes the warship as an instrumentality, there is no precise analogy with land forces, though where land forces man an installation in an assigned area, the parallel is close.³⁷ Otherwise, though one can speak of an organized body of men performing an assigned mission on behalf of the sending state, the absence of a physical entity, like a warship, which gives form to the concept, makes the argument less convincing.

A warship in a foreign port may well present a less serious threat both to the security of the littoral state and to its inhabitants than a land force stationed on its territory. Foreign

the foreign naval service, and subject to its *de facto* control. Such officers obviously possess no right, however, to arrest seamen who have deserted and escaped from actual control." 2 Hyde, *op. cit. supra*, note 10, at 831. Hyde cites *Tucker v. Alexandroff*, 183 U.S. 424, in which the court observed: "[W]e have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervit opus*, and to that extent this country waives its jurisdiction over the foreign crew or command." For criticism of this statement, see 2 Gidel, *op. cit. supra*, note 2, at 379.

In *The U.S.S. Mohecan*, a midshipman who had gone ashore in Brazil fired five shots in the streets of the city at one of his boatmen who attempted to desert. He was arrested and taken before the chief of police, who discharged him, allegedly with a reprimand. The Department of State stated that the act of the midshipman "in firing a pistol at a deserter in a street of Maranhão was a breach of the peace, offensive to the dignity of Brazil, which the Government of that country may well expect the United States to disallow and censure." Mr. Seward, Secretary of State, to Mr. Webb, Jan. 23, 1867, M.S. Inst. Brazil, XVI, 162; 2 Moore, *op. cit. supra*, note 1, at 590.

The case could, however, be distinguished on the ground the midshipman displayed excessive zeal in resorting to gunfire.

The *United States Navy Regulations 1948* contemplate that men may be landed to capture deserters with the permission of the local authorities (Article 0622, note 34, *supra*) and the *Queen's Regulations and Admiralty Instructions of Great Britain* do also. Colombos, *op. cit. supra*, note 8, at 237.

³⁷ "The immunity of a foreign vessel of war is frequently said to apply in respect of members of the crew while on shore and 'on duty.' This undoubtedly has furnished the concept applied by Oppenheim to an army. Based on the theory of extritoriality, the latter is a 'body' and immunity beyond its 'lines' is confined to members on duty." Rand, J. in *References Re Exemption of U.S. Forces from Canadian Criminal Law*, (1943) 4 D.L.R. 11, 47.

land forces are likely to intermingle more with the inhabitants and to have more frequent contact with them, over a longer period, than the crew of a warship. Maintaining strict discipline over the crew of a warship during a short visit is easier than maintaining it over land forces during an extended stay. The distinction is recognized in the differentiation made between the entrance of a warship to a foreign port without specific permission and the requirement that a land force obtain express permission before it enters foreign territory.³⁸

It is difficult on the other hand to discern any reason why troops on foreign territory are more entitled to immunity from the jurisdiction of the territorial state than the crew of visiting warships. Such distinctions as can be made point in the other direction. But even if their situations are treated as identical, precedents with respect to the crews of warships offer little comfort to those who believe visiting land forces should enjoy complete immunity from the receiving state's jurisdiction. No clear basis appears for distinguishing between crews on shore on leave and troops off duty in a neighboring town.

³⁸ "But the role which is applicable to armies, does not appear to be applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers, often, indeed, generally, attending it, do not ensue from admitting a ship of war, without special license, into a foreign port." *The Schooner Exchange*, *op. cit. supra*, note 9, at 140.

The Restatement, *Foreign Relations Law*, recognizes the distinction. Comment a to Sec. 52, p. 176, states that "In the case of foreign naval vessels, notification of an intended visit is customary. It is not necessary that the coastal state expressly communicate in return its consent to the visit. The mere fact that it does not expressly prohibit the visit is sufficient consent." But Sec. 57, p. 183, states that "In time of peace, a force of a state has no right to be present in the territory of another state without the express consent of the territorial state," and Comment a to that section distinguishes the case of a naval vessel entering a port. Comment b, p. 184, notes that "The entry of a foreign force into the territory of a state is too important a matter to be based upon mere implication of consent by the territorial state."

CHAPTER V

LAND FORCES

One can speak with some assurance regarding many of the problems of jurisdiction over warships and their crews, on the basis of the opinion of writers, court decisions and the practice of states. As to land forces, however, in the absence of an agreement as to their status there is a paucity of precedent upon which firm conclusions regarding jurisdiction over such forces can be based.

The United States Government in 1943 formally took the position that a rule of international law "recognizes the immunity from local jurisdiction in criminal matters of members of the armed forces of a foreign sovereign on the territory by permission or with the consent of the local sovereign."¹ The same position was taken by Colonel Archibald King in an article which did much to shape American attitudes toward the status of forces problem.² The Department of Justice, the Department of State and the Department of Defense have since taken the reverse position.³ The latter position has the support of other commentators,

¹ Memorandum submitted by the United States to the Canadian Government in the "Reference Re Exemption of United States Forces from Canadian Criminal Law" [1943], 4 D.L.R. 11, at 405 of the Memorandum. The Memorandum, and the "Factum of the Attorney General of Canada" submitted to the Supreme Court of Canada in the Reference, are both reprinted in Hearings on H.J. Res. 309 Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 404 (July 13, 14, 19-21, 26, 1955).

² King, "Jurisdiction over Friendly Foreign Armed Forces," 36 *A.J.I.L.* 539 (1942).

³ See the statement of the Attorney General, submitted to the Senate Foreign Relations Committee in the hearing on the NATO Status of Forces Agreement and reprinted in 99 Cong. Rec. 8762 (1953). Assistant Attorney General Rankin said of this statement: "We examined every authority we could find. We examined the original text, the French, the Italian, and all of the various law, body of law, of the countries involved in the NATO agreements, and I then reviewed it all and we came to the conclusion * * * that Colonel King's position could not be maintained, either under the

notably Dr. G. P. Barton in an outstanding series of articles.⁴ It is worthwhile to inquire into the basis for the stand taken in 1943, and for the reversal of that position.

All discussion of the issue begins with the opinion of Chief Justice Marshall in *The Schooner Exchange*.⁵ The opinion, it should be noted, is first and foremost an affirmation of the primacy of territorial jurisdiction. Its major premise is that "the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute * * *", and that all exceptions to its "full and complete power * * * must be traced up to the consent of the nation itself."⁶ However, in view of the "perfect equality and absolute independence of sovereigns," territorial jurisdiction "would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its object." Hence sovereigns and ambassadors are accorded immunity, and

"A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions.

decisions or under the practice * * *." Hearings, H.J. Res. 309, *supra*, note 1, at 343.

A memorandum of the State Department stated: "NATO military personnel are not immune from the criminal jurisdiction of the United States or of the several states. It is the position of the United States that there is no such immunity under international law." Hearings on Status of the North Atlantic Treaty Organization, Armed Forces and Military Headquarters before the Senate Foreign Relations Committee, 83rd Cong., 1st Sess. (1953).

⁴ Barton, "Foreign Armed Forces: Immunity from Supervisory Jurisdiction," 1949 *Brit. Yb. Int'l L.* 380; Barton, "Foreign Armed Forces: Immunity from Criminal Jurisdiction," 1950 *Brit. Yb. Int'l L.* 186; Barton, "Foreign Armed Forces: Qualified Jurisdictional Immunity," 1954 *Brit. Yb. Int'l L.* 341.

⁵ 11 U.S. (7 Cranch) 116 (1812).

⁶ "It is clear from the language of that decision that the governing, basic, principle is not the immunity of the foreign state but the full jurisdiction of the territorial state and that any immunity of the foreign state must be traced to a waiver—express or implied—of its jurisdiction on the part of the territorial state. Any derogation from that jurisdiction is an impairment of the sovereignty of the territorial state and must not readily be assumed." Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 1951 *Brit. Yb. Int'l L.* 220, 229. The Supreme Court, in *Wilson v. Girard*, 354 U.S. 524, 529 (1957), cited *The Schooner Exchange* as authority for the statement that "A sovereign nation has exclusive jurisdiction to punish offenses against its law committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."

“In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.”⁷

Marshall cited neither authority nor precedent for his observation regarding jurisdiction over foreign armed forces; there was little he could have cited.⁸ Text writers in the intervening years prior to World War II based their comments largely on Marshall’s opinion;⁹ for other than treaty arrangements in World War I,¹⁰ there was little else on which they could have been based.

⁷ 11 U.S. (7 Cranch) 116, 135 (1812).

⁸ Hall states that “Either from oversight, or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter.” Hall, 1 *International Law* 237–38 (8th ed. 1934). He cites Casaregis and Lampridi as having taken opposing positions on the matter.

⁹ Wheaton’s comment (1 *Inter. Law* 234 (6th ed. 1929).) is virtually a quotation from Marshall’s opinion, as is that of Wildman, 1 *Institutes of Inter. Law* 66 (1849).

¹⁰ *United States v. Thierichens*, 243 Fed. 419 (D.C., E.D., Pa., 1917) held subject to American jurisdiction the commander of the German cruiser Prinz Eitel Friedrich, interned in Philadelphia, for smuggling and violation of the Mann Act.

The Military Court of Rome held, in *In re Polimeni* [1935–1937] Ann. Dig. 248 (No. 101), that Italy had jurisdiction where a member of the Italian armed forces in the Saar Territory, in connection with the plebiscite there, assaulted a British corporal. The court said: “International law recognizes the so-called fiction of extraterritoriality, which applies to troops passing

THEORETICAL BASES FOR IMMUNITY

A. The Interests of the Sending State

Chief Justice Marshall's reference to the "perfect equality and absolute independence of sovereigns" and to a sovereign's "dignity and the dignity of his nation" can hardly be read to mean that every instrumentality and every representative of a sovereign is, when abroad, necessarily completely immune from local jurisdiction. Marshall himself stated that:

"The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, *its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it, must be supposed to act.*" ¹¹

Moreover, there are simply too many cases of public instrumentalities, e.g., public vessels engaged in commerce, and of representatives of a sovereign, e.g., the lesser personnel of an embassy, consuls, representatives to international organizations, who admittedly do not enjoy complete immunity, to assert that either the equality and independence of states or the respect due to a sovereign requires complete immunity for every instrumentality or representative. An argument along these lines could, with respect to visiting forces, be made on behalf of a commander

through or stationed in the territory of another State. This fiction is based upon the undisputed principle that armies, the supreme expression of the force upon which the sovereignty of a State is founded, carry their laws and their judges with them. From this follows another principle, namely that the members of the army which passes through or is stationed in foreign territory cannot be subject to the criminal jurisdiction of the territory, but only to Italian military criminal jurisdiction, regardless of whether the crime is one of military or of common law." This is, of course, dictum; Italy undoubtedly had at least concurrent jurisdiction over the accused.

Compare *In re Besednjak*, Court of Assize, Trieste, Italy, Jan. 16, 1948, [1948] Ann. Dig. 106 (No. 33), in which the court rejected a plea that the accused were members of the Yugoslav armed forces. The court held that Yugoslavia was not allied or associated with Italy in 1945, although it was a co-belligerent, so Article 26 of the Italian Military Code in Time of War, which provided that if an expeditionary force of an allied state was stationed in Italian territory, only authorities of the force could try members of the force, was not applicable.

¹¹ U.S. (7 Cranch) 116, 143 (1812). (Emphasis added.)

but loses much of its force if advanced on behalf of every soldier, sailor, marine, and airman.¹²

The fundamental reason advanced by Marshall for his position was that of military exigency; that, in brief, the immunity of visiting forces rests on a functional basis. There is nothing in his language suggesting the fiction of extraterritoriality and, given the present standing of that fiction, one must discount the comments of those writers who invoke it as the basis for their claim that the immunity exists.¹³

¹² "It would appear from the reasoning of the Court, [in *The Exchange*], that the basis of immunity in all cases was the same fundamental principle that the absolute jurisdiction of one state does not envisage the sovereign right of another state as its object. However satisfactory this principle may be as a basis for sovereign and diplomatic immunity, there are strong reasons of theory and practice for seeking a more solid principle on which to base the jurisdictional immunity of visiting forces." Barton, 1949 Brit. Yb. Int'l L. 280, 411-12.

But compare Senator Dirksen, 99th Cong. Rec., 8773 (1953): "Every American citizen and every American soldier is a symbol of American sovereignty when we send him abroad; and, unless we protect him, we demean and degrade the very sovereignty he represents." See also Hall, *op. cit. supra*, note 9, at 219: "The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolize something to which deference and respect are due, and they are consequently treated with deference and respect themselves." The Canadian Attorney General referred to "that fundamental principle which requires * * * that the dignity and independence of the foreign government concerned be preserved entirely in this field of international relations." Canadian Factum, Hearings, H.J. Res. 309, *supra*, note 1, at 431. See also Heyking, *L'Exterritorialité*, 156 (1889).

¹³ It is not always possible to determine whether a writer who refers to extraterritoriality as the basis for the immunity of visiting forces is in fact invoking the fiction or merely using the term as a summary of other ideas or to describe a result.

Apparently Oppenheim should be included among the former (1 Lauterpacht-Oppenheim, *International Law* 853 (8th Ed. 1957) [cited at n. 1, ch. IV]), as should Foelix, who wrote: "After having explained how vessels navigating on the high seas form the continuation of the nation's territory, we must concern ourselves with another fiction of the *droit des gens*, relating to the person of the individual accused of a crime or offense. The soldier under the flag or on active duty who finds himself in a foreign country is considered as being in his country: in consequence, even though he is in a friendly or neutral country, the crimes or offenses of which he is culpable are punished as though they had been committed in his country." 2 *Droit International Privé* 263 (1866)

Military exigency has been accepted by most writers as the controlling factor in the situation. It has been the primary basis for those who have reached the conclusion that the jurisdiction of the sending state over visiting forces passing through or stationed in a foreign state is exclusive ¹⁴—which may or may not have been Marshall's view. Only a few writers have analyzed the situation in depth and explained precisely what the factors of military exigency are which require recognizing so extensive an immunity.

It should be beyond dispute that a military commander must be able to maintain discipline over the forces under his command, wherever they may be. If he lacked that power, taking an army into foreign territory would be in effect to disband it. Stated

Twiss, who discussed the immunity of foreign forces and warships under the heading: "Extra-Territoriality of certain Foreign Persons and Things," said in part: "A ship of war has been termed an expansion of the territory of the Nation to which it belongs, not only when it is on the wide ocean but when it is in a foreign port. In this respect the ship of war resembles an army marching by consent through a neutral territory. Neither ships of war nor army so licensed fall under the jurisdiction of a Foreign State." *Law of Nations*, 271-272 (1884).

See also 1 Phillimore, *Inter. Law* 474 (3d ed. 1879); 1 Wharton, *Inter. Law Digest* 43 (2d ed. 1887); Holland, *Lectures on International Law*, 148-149 (1933); 1 De Martens, *Traite de Droit International*, 449 (1883).

Taylor sets forth the fiction but attributes it to necessity and convenience, and in a subsequent comment says: "It may be stated as a general rule that a foreign army passing over the territory of a friendly state, whether as an ally in a common cause or not, is entirely exempt from its civil and criminal jurisdiction, for the reason that any other rule would be destructive of discipline. * * * If an exception to this general rule exists it is in favor of the local jurisdiction over an offending member of the force found entirely outside its line." *International Public Law* 230 (1901).

¹⁴ Among the writers who assert that the sending state has exclusive jurisdiction over its forces, some support their conclusion only by reference to the necessity that the commander of the visiting forces be able to maintain discipline, apparently assuming it to be self-evident that the maintenance of discipline requires not only the right to exercise jurisdiction but that it be exclusive. Others either expressly assert this to be true, or take the position that military exigency requires the commander be able to maintain control, as distinguished from discipline, and that the maintenance of control demands that the sending state's jurisdiction be exclusive. Some refer to neither factor, but simply assert that military exigency requires that the sending state have exclusive jurisdiction.

Hyde states that: "Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which,

another way, the sending state must have jurisdiction to prescribe rules with respect to the members of its armed forces abroad. For the great majority of the members of an armed force such jurisdiction could be based on nationality; however, this is not the

with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up." 1 Hyde, *International Law* 819 (2d ed. rev. 1945).

Hall states that: "There can be no question that the concession of jurisdiction over passing troops to the local authorities would be extremely inconvenient; and it is believed that the commanders, not only of forces in transit through a friendly country with which no convention exists, but also of forces stationed there, assert exclusive jurisdiction in principle in respect of offenses committed by persons under their command, though they may be willing as a matter of concession to hand over culprits to the civil power when they have confidence in the courts, and when their stay is likely to be long enough to allow the case being watched. The existence of a double jurisdiction in a foreign country being scarcely compatible with the discipline of an army, it is evidence that there would be some difficulty in carrying out any other arrangement." Hall, *op. cit. supra*, note 8, at 250-51.

Adinolfi states: "Exemption in the case of the army and that in the case of warships have a single basis.

"Both the army and warships are autonomous entities having, within each State, their own laws, their own judge, their own executive powers; this establishes the force of discipline. The soldier of the land and of the sea must obey his hierarchical superior alone.

"If other powers had the competence to intervene, this bond would be severed. Now whatever the unit is, the bond must be kept unbroken." *Diritto Internazionale Penale*, Hearings, H.S. Res. 309, *supra*, note 1, at 411.

Travers states: "The members of a foreign army, taken in this quality, that is to say, considered as an integral part of the public force of a foreign State, can not be subjected to the local repressive jurisdiction without there being a conflict with the sovereignty of the foreign State, and interfering with its right of free disposition of its armed forces.

"Again a government which accepts the presence of foreign troops on its territory consents implicitly that the foreign authorities retain over such troops the exclusive jurisdiction which is necessary for the perfect maintenance of discipline." 2 *Le Droit Penal International*, 346-47 (1921).

Calvo, although he says that "When an independent state accords to a foreign army permission to pass or to sojourn on its territory, the persons who compose that army, or find themselves in its ranks, have a right to the prerogatives of extraterritoriality," says also that: "One understands without difficulty the dangers and the inconveniences of all sorts to which troops in passage would be exposed if their direction and their police were taken from their own officers to be exercised by foreign authorities." 1 *Le Droit International*, 616 (3d ed. 1880).

most compelling basis. Rather, it is the relationship between an individual and the sending state resulting from his status as a member of its armed forces and not nationality which compels recognition of the sending state's jurisdiction.¹⁵

Merchant seamen are subject to the flag state's jurisdiction to prescribe rules even though they may not be its nationals. Certainly there is a much stronger reason for recognizing such jurisdiction over members of a state's armed forces. The jurisdiction of a state to prescribe rules with respect to its nationals abroad is recognized; however, there are considerations of policy both for and against its exercise, and most states have found the considerations against it to be more persuasive. But where troops are involved there is no need to give as a reason for recognizing the jurisdiction of the sending state that their conduct abroad may disturb the public order of the sending state. There is nothing shocking in the idea of subjecting military personnel to the court-martial jurisdiction of the state they serve and of making them liable to its operation in whatever part of the world they may be. On the contrary, the idea is startling that a soldier abroad should be free of all restraints except those which the receiving state chooses to impose. In other words, those considerations of policy which bear upon the wisdom of asserting jurisdiction over nationals with respect to their conduct abroad are largely irrelevant in the case of troops. The relevant considerations are rather those which underlie the exercise of jurisdiction on the protective principle, that is, those which concern the security of the state.¹⁶

Military discipline is a broad term. One can differentiate be-

¹⁵ "The relationship established when an alien becomes a member of the national forces of a state gives the state jurisdiction to prescribe rules governing the conduct of the alien, notwithstanding the fact that the service in the national forces does not make him a national of the state." Restatement, *Foreign Relations Law*, Section 31, Comment c, p. 92.

¹⁶ "A state has jurisdiction to prescribe rules attaching legal consequences to * * * (b) conduct of any person who is a member of its national forces." Restatement, *Foreign Relations Law*, Section 31. "Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits." Spenz, C. J., in *Mohammad Mohy-ud-Din v. The King Emperor*, Federal Court, India, May 9, 1946, [1946] Ann. Dig. 94 (No. 40). The accused was not a British subject. See also *Rex v. Page*, Courts-Martial Appeal Court, England, Nov. 10, 1953, [1953] Int'l L. Rep. 188;

tween violations of military discipline which relate directly to, and those only remotely related to, the performance of military duty. One would expect most violations of local criminal law to fall into the latter category. It can be said, of course, that the maintenance of discipline requires holding troops to a standard of conduct at all times whether they are on or off duty.¹⁷

The relationship between a visiting armed force and the receiving state is of paramount importance, for violations of local law may affect not only its ability to maintain itself as an effective force but its right to remain in the foreign country. The fact cannot be ignored that troops in uniform are less likely to be considered as individuals and more likely simply to be identified with the sending state, than even the most obviously British, French or American tourist or businessman. It is understandable, therefore, that a sending state should make violations of the local criminal law a breach of its military regulations, and its right to do so can hardly be challenged.

Whether the sending state must be able to exercise enforcement jurisdiction over its troops in the territory of the receiving state is a different issue. It is not quite true that the right to prescribe with respect to conduct abroad is valueless unless there is a correlative right to enforce. Theoretically, it is possible to postpone the exercise of the right to enforce until the offender is again on the territory of the sending state, and practically this is the procedure followed in cases involving an ordinary citizen. States that

Lahis v. Minister of Defence, Israel, Supreme Court, Feb. 1, 1949, [1949] Ann. Dig. 96 (No. 34).

¹⁷ "It is elementary that in order to carry out a military purpose it is necessary that the commander be able to maintain discipline. This requires that he have complete control over members of his forces at all times and in all places. If a foreign force is permitted to intervene and break this relationship, the military commander loses control over his forces and not only is his power to maintain discipline removed in the instances where this actually occurs but it is weakened in all instances by the knowledge that such interference is possible. If the soldier is subject to the civil authorities for acts committed when 'off duty' it is evident that the power of the military authorities to prevent such occurrences is practically nullified." U.S. Memorandum, Hearings, H.J. Res. 309, *supra*, note 1, at 417.

"It is not, of course, a matter of the Defense Department not wishing to have exclusive jurisdiction over its own people abroad. Every military commander would, of course, prefer for disciplinary reasons to have such exclusive jurisdiction." Mr. Brucker, Gen. Counsel, Dept. of Defense (later Sec. of the Army), *id.*, at 238.

exercise jurisdiction over their nationals for acts done abroad, or over aliens with respect to conduct abroad, do not presume to exercise enforcement jurisdiction in the territory of the state where the offense occurred. While undefined but narrowly limited jurisdiction may be exercised on board a merchant vessel in a foreign harbor by the flag state, a more extensive jurisdiction may be exercised on board a warship in a foreign harbor. Such jurisdiction may not, however, be exercised on shore, even with respect to the crew of a warship, without the express consent of the territorial state, except, perhaps, through a limited power to police.

Does military exigency require the recognition of a more extensive jurisdiction to enforce in the case of armed forces passing through or stationed on the territory of a foreign state than is needed in the case of a visiting warship? It seems clear that it does.¹⁸ Such forces perform their duties, often for long periods, in the territory of the foreign state, rather than primarily on a warship which is only temporarily in its harbor. Returning them to the sending state for trial for every infraction of discipline would be not only prejudicial to the effective administration of justice—as well as prohibitively expensive—but disruptive of the efficiency of the force.¹⁹

¹⁸ "Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory implies that it consents to the exercise of the sending state's jurisdiction to enforce, with respect to the members of the force, rules reasonably necessary for the internal administration and discipline of the force." Restatement, *Foreign Relations Law*, Section 59, p. 188.

¹⁹ "[I]f you are to have visiting forces in a country at all they must be able to operate their own disciplinary system. That would be a reasonable exception to the rule that they are not governed by their own law but by the laws of the countries which they visit. If they visit countries as a military force under military regulation and military discipline it is in every way reasonable that they should be allowed to operate their own military law so far as the members of their forces are concerned." Mr. Sidney Silverman, 505 H.C. Deb. (5th ser.) 594 (1952).

But Italy "felt obliged under Italian law to maintain that United States courts-martial could not constitutionally operate on Italian soil. We do not believe that the Italian view * * * can be written off as one of their national idiosyncrasies." Secretary of Defense Wilson, Hearings on H.R. 8704 Before the House Committee on Foreign Affairs, 85th Cong., 1st Sess. 3447 (1957). It should be noted that the Italian position was based on Italian constitutional law, not on international law.

The conclusion that the military authorities of the sending state must be able to exercise enforcement jurisdiction in the receiving state should not, however, blind one to the fact that even in this area military exigency is a relative term. Military exigency is also the principal argument for recognizing the right of the military authorities of the sending state to exercise jurisdiction over civilian employees and dependents accompanying the visiting force. As will be pointed out below, the negotiators of the NATO Agreement recognized the primary jurisdiction of the sending state over civilian employees as a concession to the United States, not from conviction, and denied it with respect to dependents. Moreover, the Supreme Court has denied the jurisdiction of American courts-martial over both civilian employees and de-

The Czechoslovak Military Court of Appeal in London held in the Allied Forces (Czechoslovakia) case, July 15, 1942, [1941-1942] Ann. Dig. 123 (No. 31), that a Czechoslovak Military Court could sit in Great Britain only if authorized to do so by British law, and therefore could not try a Czechoslovak officer for an offence committed prior to the effective date of the Allied Forces Act, 1940.

The comments of Mr. Justice Clark in his dissenting opinion in *Reid v. Covert*, 354 U.S. 1 (1957), although they relate to the alternatives to trial of dependents by courts-martial, are pertinent. He said, at 88:

"Likewise, trial of offenders by an Article III court in this country, perhaps workable in some cases, is equally impracticable as a general solution to the problem. The hundreds of petty cases involving blackmarket operations, narcotics, immorality, and the like, could hardly be brought here for prosecution even if the Congress and the foreign nation involved authorized such a procedure. Aside from the tremendous waste of the time of military personnel and the resultant disruptions as well as the large expenditure of money necessary to bring witnesses and evidence to the United States, the deterrent effect of the prosecution would be *nil* because of the delay and distance at which it would be held. Furthermore, compulsory process is an essential to any system of justice. The attendance of foreign nationals as witnesses at a judicial proceeding in this country could rest only on a voluntary basis and depositions could not be required. As a matter of international law such attendance could never be compelled and the court in such a proceeding would be powerless to control this vital element in its procedure. In short, this solution could only result in the practical abdication of American judicial authority over most of the offenses committed by American civilians in foreign countries."

See also Mr. Justice Clark's comment along the same lines in his opinion for the majority in the companion case, reversed on rehearing, of *Kinsella v. Krueger*, 351 U.S. 470 (1956), note 12, at 479, and that of Mr. Justice Harlan in his concurring opinion in *Reid v. Covert*, 354 U.S. 1 (1957), note 12, at 76.

pendents.²⁰ The issue in these cases is not, of course, quite the same, but the principal argument was that military exigency—the need to maintain discipline—required recognition of the jurisdiction.²¹

The other side of this coin concerns the right of the receiving

²⁰ *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagen*, 361 U.S. 278 (1960); *McElroy v. Guagliardo* and *Wilson v. Bohlender*, 361 U.S. 281 (1960).

²¹ Mr. Justice Harlan, in his concurring opinion in *Reid v. Covert*, 354 U.S. 1, 71 (1957), said:

“The Government, it seems to me, has made a strong showing that the court-martial of civilian dependents abroad has a close connection to the proper and effective functioning of our overseas military contingents. * * * Suffice it to say that to all intents and purposes these civilian dependents are part of the military community overseas, are so regarded by the host country, and must be subjected to the same discipline if the military commander is to have the power to prevent activities which would jeopardize the security and effectiveness of his command.”

In a footnote, the Justice added: “This necessity is particularly acute with regard to peculiarly ‘military’ and ‘local’ offenses which must be dealt with swiftly and effectively. Thus security regulations at these military installations must be enforced against civilian dependents as well as servicemen; the same is true of base traffic violations, black marketeering, misuse of military customs and post-exchange privileges.”

Mr. Justice Clark, in his dissenting opinion, said, at 83: “It cannot be denied that disciplinary problems have been multiplied and complicated by this influx of civilians onto military bases, and Congress has provided that military personnel and civilians alike shall be governed by the same law administered by the same courts.”

He then quoted the following from Judge Latimer’s opinion in *United States v. Burney*, 7 U.S.C.M.A. 776; 21 C.M.R. 98 (1956):

“[It] is readily ascertainable that black market transactions, trafficking in habit-forming drugs, unlawful currency circulation, promotion of illicit sex relations, and a myriad of other crimes which may be perpetrated by persons closely connected with one of the services, could have a direct and forceful impact on the efficiency and discipline of the command. One need only view the volume of business transacted by military courts involving, for instance, the sale and use of narcotics in the Far East, to be shocked into a realization of the truth of the previous statements. If the Services have no power within their own systems to punish that type of offender, then indeed overseas crimes between civilians and military personnel will flourish and that amongst civilians will thrive unabated and untouched. A few civilians plying an unlawful trade in military communities can, without fail, impair the discipline and combat readiness of a unit * * *.”

Mr. Justice Clark added: “In addition, it is reasonable to provide that the military commander who bears full responsibility for the care and safety of those civilians attached to his command should also have authority to

state to exercise jurisdiction with respect to action taken against a member of the armed forces of the sending state by its military authorities. If an individual arrested, tried, and punished by such authorities has a cause of action in the court of the receiving state for assault, false arrest, or false imprisonment, or if a writ of *habeas corpus* may be issued, then the sending state has no effective power to exercise enforcement jurisdiction in the receiving state. Alternatively, if the accused's remedy in a court of the receiving state is limited to obtaining a review in the nature of a proceeding in error, or is even more limited, to a proceeding testing whether the military authorities of the sending state acted within their jurisdiction, then the military authorities have a right, limited but significant, to exercise enforcement jurisdiction. If the accused has no recourse to the courts of the receiving state, the enforcement jurisdiction of the sending state is complete. Extensive though perhaps not necessarily complete immunity from the supervisory jurisdiction of the receiving state is seemingly a necessary corollary of the right of the sending state to exercise enforcement jurisdiction in the receiving state.²²

It has been asserted that Chief Justice Marshall, in referring to the immunity of foreign armed forces from local jurisdiction, had in mind only this immunity from the supervisory jurisdiction of the local courts, not that of the troops from local criminal jurisdiction. His language can be so read and the view that it should be has elicited impressive support,²³ but the argument for the traditional reading seems persuasive.²⁴

regulate their conduct. Moreover, all members of an overseas contingent should receive equal treatment before the law. In their actual day-to-day living they are a part of the same unique communities, and the same legal considerations should apply to all. There is no reason for according to one class a different treatment than is accorded to another. The effect of such a double standard on discipline, efficiency, and morale can easily be seen." (at 85).

²² "Under the rule stated in this Section, the territorial state may not treat the actions of the military authorities of the sending state in their exercise of its jurisdiction as though they were illegal acts under the law of the territorial state." Restatement, *Foreign Relations Law*, Comment a to Section 59, p. 189.

²³ Barton, 1949 Brit. Yb. Int'l L., *op. cit. supra*, note 4, at 384. See the statement of the Attorney General, 99 Cong. Rec. 8767 (1953) and the statement of Senator Ferguson entitled "Immunity of Friendly Foreign Forces under International Law," 99 Cong. Rec. 8759 (1953).

²⁴ *Wright v. Cantrell*, [1943] 44 S.R.N.S.W. 45; [1943-1945] Ann. Dig.

The right to exercise enforcement jurisdiction referred to is, however, a jurisdiction over the armed forces of the sending state, not over the citizens or residents of the receiving state who have no connection with those forces. The effective administration of justice requires the power to compel the attendance of witnesses and the production of documents and to punish for contempt and perjury. It will be recalled that the lack of such power over others than its own nationals was a major weakness when the United States exercised extraterritorial jurisdiction in China. It seems most unlikely, nevertheless, that military exigency would ever be viewed as sufficiently compelling to justify the exercise of jurisdiction by the sending state over other than its armed forces, unless the authority of the territorial state was no longer operative in the area.²⁵

The effective exercise of enforcement jurisdiction likewise requires, if not police power in the visiting forces,²⁶ at least the sympathetic cooperation of the local police. For the local police to arrest for a violation of the sending state's military regulations is, however, for them to undertake to enforce foreign penal law, and to turn the offender over to the authorities of the sending

(No. 37), cited by Dr. Barton, reflects the view that the approach to the immunity of armed forces should be in functional terms, but does not, it is submitted, indicate the belief that only immunity from supervisory jurisdiction is, in those terms, necessary.

²⁵ In *Ministère Public v. Saelens*, Court Martial of Ypres, Belgium, Oct. 25, 1945, [1946] Ann. Dig. 85 (No. 35), the accused was charged with offences against the safety of the Allied armies in Belgium. He contended that a domiciliary search had been carried out by British MPs without a regular warrant. In dismissing the charges the court said: "The military police of an allied occupying Power is not competent to resort to domiciliary search for the purpose of investigating and repressing offences subject to Belgian law. No Belgian law grants British Military Police such rights. On the contrary, the Convention concluded on May 16, 1944 in London between the Belgian Government and allied Governments provided that Belgians who have committed crimes or delicts against allied armies shall be summoned before Belgian Courts Martial and that the crimes and delicts shall be investigated and punished in accordance with Belgian law."

²⁶ The British Government, in the World War I negotiations with the United States, indicated its belief that police power could not be exercised by the American military authorities outside the limits of their camps without the express consent of the British government. See p. 120, *infra*. See also Barton, 1954 *Brit. Yb. Int'l L.* 341. The United States Congress apparently assumed the contrary, in enacting the Service Courts of Friendly Foreign Forces Act. See p. 132, *infra*.

state is equivalent to extradition.²⁷ It is evident that the existence of such power in the local police might be successfully challenged and that the officer who exercised it might incur civil liability.²⁸

The issues thus raised are quite distinct from the issue whether the jurisdiction of the sending state both to prescribe and to enforce as to its forces in the receiving state is exclusive or the receiving state has concurrent jurisdiction. The argument that the sending state must have jurisdiction over its forces is compelling. That military exigency demands that such jurisdiction be exclusive is much more debatable and is indeed the crucial question.

Exercise of jurisdiction by the receiving state does not, in a direct sense, preclude the sending state from maintaining discipline. Even if an act is a much more serious offense under the military law of the sending state than under the criminal law of the receiving state, as may well be true, it does not necessarily follow that the sending state should have exclusive jurisdiction, though common sense would suggest that the receiving state should recognize a prior claim in the sending state.²⁹ More is, however, involved. Maintaining discipline, like maintaining respect for any system of criminal law, requires prompt prosecution. Concurrent jurisdiction, or rules for determining priority of jurisdiction which are less than clear cut, can occasion delay—which can be disruptive of discipline. A rule allocating exclusive or primary jurisdiction to the sending state could have the large advantage of eliminating such delays.

It has been said that a commander must be able not only to

²⁷ It was, however, held in *Katzu* Officer Commanding the Polish Military Prison, Jerusalem, Supreme Court, Palestine, July 7, 1944, [1943-1945] Ann. Dig. 165 (No. 45), that the fact a member of a foreign force was irregularly handed over to the military police of that force after apprehension by the local civil police did not deprive the foreign court martial of jurisdiction.

²⁸ "To justify his detention on British soil, authority must be found in the law of this country. * * *" Viscount Caldecote, C.J., *In Re Amand* [1941], 2 K.B. 239, a habeas corpus proceeding brought by a Dutch citizen arrested pursuant to the Allied Forces Act for desertion from the Netherlands forces.

²⁹ "[T]here may well be cases in which an offense may be a trifling matter from the point of view of our domestic law but a serious breach of discipline from the point of view of the military authorities. In such cases common sense would require the offender to be handed over to the military authorities to be dealt with, just as the British soldier is handed over in similar circumstances." Sir David Maxwell Fyfe, Home Secretary, 505 H.C. Deb. (5th ser.) 566-67 (1952).

maintain discipline but to maintain control over his command. It is true that the exercise of jurisdiction by the receiving state removes the accused from the control of the sending state, and his unavailability may reduce the effectiveness of the force.³⁰ The "for want of a nail" approach can, however, be pushed too far. The alternative to the exercise of jurisdiction by the receiving state is not complete immunity, but trial by a court-martial of the visiting forces, and the availability for duty of the offender, at least in an emergency, can be as much affected by his court-martial and imprisonment in a military prison as by his detention, trial and imprisonment by the receiving state. The argument that if one soldier may be imprisoned a thousand may be³¹ is

³⁰ The Canadian Factum refers to the "* * * fundamental principle which requires that the commander of the visiting troops be not interfered with in the control and disposition of his forces * * *," and continues: "It is difficult to see how a visiting allied force could fully and efficiently function as an organization of the State to which it belongs if its members who remain component parts thereof and subject to be called to action at any time as long as they retain their connection therewith, were liable to be arrested, prosecuted and detained by the local authorities for offenses committed by them while on leave." Hearings, H.J. Res. 309, *supra*, note 1, at 431.

It was said in the British Parliament that: "Clearly, if a body of foreign troops is serving in this country it is far better that they should serve under their own code of discipline than be amenable to the courts of this country. * * * Under our own code, for a British soldier to fight a citizen of a foreign country in which he happens to serve is a much more serious offence under the military code than under the civil code. Obviously an American commander, just like a British commander who has British troops serving in America, is very concerned about the reputation of the troops under his command and the maintenance of discipline. It would not be much use unless he had effective control, and * * * it is of paramount importance that American commanders should have control of their forces here. * * * The point which we are really discussing is who is to control the forces * * * are they to be effectively controlled by the American commander or by the chairman of the bench of magistrates in the area in which they are serving. I prefer that effective control shall rest in the hands of the American commander." Mr. George Wigg, 505 H.C. Deb. (5th ser.) 1073-76 (1952).

³¹ "But more important even than the weakening of discipline by the exercise of divided authority is the fact that it gives to the local authorities the power to remove a nation's troops from its control, for if one soldier can be arrested and imprisoned by the local authorities so can a thousand. If enlisted men can be arrested and imprisoned, so can their officers, including even the commander of the forces himself. Thus also the purpose for which the forces were admitted can be defeated and the local sovereign be placed in the contradictory position of permitting the foreign forces to

not entirely persuasive. A thousand may be imprisoned only if there is a reasonable basis for saying they have committed a thousand crimes. The alternative is to assume that a receiving state would deliberately undertake to arrest innocent men, presumably with the deliberate intent of crippling the foreign force. Power may be abused, but abuse of power on such a scale seems unlikely—even though there may be degrees of friendship between friendly allies.

The argument that a commander must have exclusive control over his forces at all times has not proved compelling with respect to the crews of warships on shore leave. Its weight with respect to land forces has been challenged on pragmatic grounds by an American judge of the Egyptian Mixed Courts³² and questioned by the Departments of State and Defense.³³

The advent of nuclear weapons, especially those married to missiles, suggests, however, a need to reappraise the issues of discipline and control. Now that the reaction time available to respond to a nuclear onslaught is measured in minutes, the need for strict discipline and complete control within a command can be imperative. Moreover, to distinguish between those troops

come on his territory to accomplish a purpose and then preventing them from accomplishing it." U.S. Memorandum, Hearings, H.J. Res. 309, *supra*, note 1, at 417.

³² "Certainly the fears expressed by Colonel King find no support in the acid test of practical experience, as exhibited in the score or more of cases in which the principle was applied in Egypt. In no quarter was the suggestion seriously made that the trial before the courts of the land of offenders against the public peace had in any manner obstructed military discipline." Brinton, "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946).

³³ General Walter Bedell Smith, Under Secretary of State, in a letter to Senator Wiley, Chairman of the Senate Foreign Relations Committee, said: "It is the opinion of the Departments of State and Defense, that it is neither necessary nor desirable for the United States to seek or have exclusive jurisdiction by treaty over its forces, civilian components, or their dependents in the NATO countries. * * *

After quoting the opinions of Generals Bradley and Ridgway, he continued:

"It would therefore appear clearly to be established that exclusive jurisdiction of our forces, civilian components, or dependents abroad, is not necessary from the military point of view. I wish to add my personal endorsement, based upon my own military experience, to that conclusion." 99 Cong. Rec., pp. 8776-77 (1953).

armed with nuclear weapons and others could well involve a too great security risk.

B. The Interests of Individuals

Debate in the United States regarding immunity for our troops abroad has centered not on military exigency but on the interests of the accused. It is the thought of a seaman or soldier unjustly accused and unfairly tried, confined in a foreign prison, rather than of a warship or army rendered less effective, which has troubled many. The legalistic answer is that immunities are accorded to protect the interests of the state, not the individual. With that answer the ordinary citizen,³⁴ accused of a crime abroad, must be content. The same is true for the majority of government employees stationed abroad. This does not mean, of course, that the individual or his government must acquiesce in any treatment he may receive at the hands of a foreign government. He is protected by the ordinary rules of international law concerning the denial of justice, and a member of the armed forces is entitled to the same protection.

The case of a member of the armed forces can be distinguished from that of the ordinary citizen only if it can be related to military exigency. It has been said that immunity for our forces has a bearing upon morale, but the evidence suggests that at least in practice the argument lacks factual support.³⁵ Again, it has

³⁴ See 2 Hackworth *Digest of International Law* 84 (1940-41). That a person is an American citizen does not "give him an immunity to commit crimes in other countries, nor entitle him to demand, of right, a trial in any mode other than that allowed to its own people by the country whose law he has violated * * *." *Neely v. Henkel* (No. 1), 180 U.S. 109, 123 (1901).

³⁵ General Hickman, Ass't. Judge Advocate General, Department of the Army (later Judge Advocate General) testified in the Hearings before a Subcommittee of the Committee on Armed Service, United States Senate, 84th Congress, 1st Sess., 40, March 29, 31 and June 21, 1955, that "The comments which have been received from field commanders and from Judge Advocates in the field, our legal officers, indicate that in all but a very few countries the operation whereby military jurisdiction is shared with foreign courts has not had an unhealthy effect upon the accomplishment of our military missions or upon the morale and discipline of our forces."

"The significant exceptions are French Morocco and Turkey where extended delays in investigations and trials have, to a certain extent, impaired morale and discipline."

For General Hickman's comments on individual countries, see *id.*, at 16. Among the more interesting are:

"The service commanders concerned have reported that arrangements and

legal procedures relative to the exercise of jurisdiction in Canada are entirely satisfactory and have resulted in no different effect on the station mission, morale, and discipline than if this station were located in the United States." *Id.*, at 34. "The Air Force commanders state that the jurisdictional arrangements in French Morocco have had a negligible impact on the accomplishment of their mission, but that the slowness of the local judicial process of the local courts has adversely affected morale and discipline, while the possibility of trial by local courts has had a positive effect on discipline." *Id.*, at 36. "The Navy commander states that an amicable relationship exists between the military and Philippine authorities under existing arrangements, and that the exercise of jurisdiction by Philippine authorities over our personnel has favorably affected the morale and discipline of our forces." *Id.*, at 37.

General Hickman testified in the hearing before the same subcommittee on February 9, 1956 that: "The comments which have been received from commanders in the field indicate that although some are adverse to the jurisdictional arrangements, nevertheless in all but one of the countries in which by agreement military jurisdiction is shared with foreign courts they consider that these arrangements have not had a detrimental effect upon the accomplishment of our military missions or upon the morale and discipline of the members of the forces. The exception is French Morocco where extended delays in investigations and trial have, to a certain extent, impaired morale and discipline." p. 32. "The Air Force commander (in French Morocco) states that the jurisdictional arrangements have had no direct effect upon the accomplishment of the mission of the command. He reports, however, that morale of personnel involved in minor offenses is affected by long delays between the date of the offense and the date of final adjudication, and that the amount of time spent by other personnel in assisting the accused and in monitoring proceedings is disproportionate to the offense in the majority of cases." p. 29. "The Army and Air Force commanders (in the Philippines) report that, except for minor inconvenience in some cases, jurisdictional arrangements have had no adverse effect upon the accomplishment of the mission or upon the morale and efficiency of the forces. The Navy commander reports that 'the impact upon morale had been quite favorable and at the same time the posed threat of arrest and conviction by Philippine courts with possible imprisonment in a Philippine jail contribute to good discipline.'" p. 29. "The Army and Navy commanders (in Canada) have reported that jurisdictional arrangements have had no adverse effects upon the morale and efficiency of their forces. The Air Force commander has stated that 'local jurisdictional arrangements have been of such a highly satisfactory nature as to assist this command in the performance of its mission.'" p. 25.

In the April 9, 1957 Hearing before the Subcommittee General Hickman again testified regarding the situation in various countries. "The Army commander in France has reported that the jurisdictional arrangements have had no significant effect upon the accomplishment of his mission. He stated that * * * the personnel of his command are tending more and more to accept as normal the right of French authorities to exercise jurisdiction in

been urged that, unlike ordinary citizens, members of the armed forces go abroad involuntarily. They nevertheless go at the order of the sending, not the receiving state.³⁶ This suggests that the sending state shall do all it can to ensure that members of its armed forces receive every protection which the law of the receiving state affords an accused. This duty the United States has recognized in full measure. It may suggest also that the sending state should do all it can to secure immunity from the receiving state's jurisdiction for its forces. It is much less clear that the receiving state has any obligation to accord immunity to the members of a visiting force because they are, in a personal sense, within its territory involuntarily. The belief that there is no convincing basis for distinguishing the case of a member of the armed forces from that of an ordinary citizen has led some to conclude they should be equally subject to the jurisdiction of the receiving state.³⁷

matters of a nonmilitary nature. However, he stated that the French procedure permitting the combined trial of criminal and civil actions is still a source of irritation and dissatisfaction.

* * * * *

"He (the Air Force Commander) stated also that time delays between the occurrence of an incident within the primary jurisdiction of France and the decision by French authorities whether to retain their jurisdiction have adversely affected his disciplinary control and the prompt administration of military justice. That would be because he would have to hold up disciplinary action in a case while waiting to learn whether he could try it by court-martial." p. 17.

³⁶ [A]s to the implied preferential treatment which might or should be given to a soldier because he is drafted and sent abroad, of course, I am extremely sympathetic to that thought: I have been at this for a long time. But technically, the fact remains that a soldier who is sent abroad, regardless of whether he is drafted or whether he volunteers, goes abroad at the will of the United States and at the will of the United States Congress, so technically, I believe, as far as civil offenses are concerned, and subject always to the safeguards of denial of justice which the United States always holds, and subject always to the fact that the United States will not itself in similar cases and under identical conditions relinquish its sovereignty, there should not be preferential treatment." General Smith, Under Secretary of State, Hearings, Before the Senate Foreign Relations Committee on Status of Forces, 83d Cong., 1st Sess. 56 (1953).

³⁷ "I can see no reason why the United States should feel that such a condition should attach to these persons any more than to other American citizens present overseas on their own or official business. The standard of conduct and of jurisdiction should be identical." General Smith, Under Secretary of State, letter to Senator Wiley, 99 Cong. Rec., 8777 (1953).

Those who feel that the case of a member of the armed forces is different from that of the ordinary citizen have made much of the point that American troops, if subject to the jurisdiction of the local courts, would be tried under a system of law with which they are not familiar³⁸ and, particularly, would not enjoy the rights guaranteed by the United States Constitution.³⁹ The force of the latter argument is somewhat diminished because not all constitutional guarantees apply to actions by a state or to courts martial. Apart from this, the force of the argument varies from country to country, depending on the rights which an accused enjoys in each. There is need, in this connection, to distinguish between those rights which the organic law guarantees and those which in practice are accorded. There can be an abuse of rights of the accused in any system. One should not compare systems of criminal law in terms of the theoretical protection accorded by one and the abuses which may occur, in practice, in another, unless, of course, those abuses are chronic. Again, the United States Senate included in the instrument of ratification of the NATO

"It seems to me that we should be concerned with whether or not an American citizen, whether a member of our Armed Forces, a dependent, or part of our civilian force, is accorded the same rights and privileges, and is tried under the same procedure that any citizen of that receiving state charged with a similar criminal offense would be entitled to have." Senator George, Hearings, Sen. For. Rel. Com., NATO Treaties, *supra*, note 3, at 49.

See also Congressman Fulton's statement, Hearings, H.J. Res. 309, *supra*, note 1, at 25: "The general question comes up how much protection can or should be given by the United States Government to United States nationals, military or civilian, abroad. Should the United States ask for the protection of United States courts and justice for every civilian who goes abroad as a tourist, so long as he has a visa and a passport? How far should or can the United States go in this general field? Or should the United States make a special case of United States servicemen who are stationed abroad either voluntarily or involuntarily, and extend the protection beyond the line of their duty, when servicemen are traveling as tourists or are out of uniform in civilian life in the foreign country."

³⁸ The argument can in general be made only with respect to procedure, since an offense against local law is normally an offense under the Uniform Code of Military Justice. This is recognized in Senator Bricker's statement: "The fact is that American servicemen are reasonably familiar with the Uniform Code of Military Justice and their rights thereunder. They do not know and we do not know anything about the criminal procedure of the other NATO countries and Japan." 99 Cong. Rec., 8747 (1953).

³⁹ See the remarks of Senator McCarran, 99 Cong. Rec., 8732-8734; Senator Dirksen, *id.*, at 8773.

Agreement a statement establishing a procedure for safeguarding the rights of the members of our forces.⁴⁰ The Senate directive has been vigorously implemented by the several services.

Trial by a court-martial of the sending state also means that the accused is tried by his fellow nationals. There is much evidence that this factor has been paramount in the minds of many who have felt most strongly that the United States should have exclusive jurisdiction over its forces abroad.⁴¹ The same point has been in part responsible for the refusal of some states to extradite their own nationals. The counter argument is that normally a man's appropriate judges, particularly in the common law system, are deemed to be those resident where the crime was committed.

A related point is that a court-martial conducted by the sending state has the great advantage, from the standpoint of the accused, that the prosecutor and judges speak his language.⁴² From the standpoint of the victim, the witnesses who are residents of

⁴⁰ See page 261, *infra*.

⁴¹ “* * * [I]n my humble opinion they still should be tried by Americans under the American system.” Congressman Bow, Hearings, H.J. Res. 309, *supra*, note 1, at 19.

“I don't know of anyone who would want to be tried, whether guilty or innocent, in a foreign court.” Congressman Le Compte, *id.*, at 21.

“I think the difference as to this question of trial by jury, even in Great Britain where our common law came from, is that he does not have a trial by jury of his peers, because his peers could only have been of his own country.” Congressman Richards, *id.*, at 104.

“* * * a man presumably might not get a trial by jury, if he is tried by court-martial, but * * * he would get a trial by Americans.” Congressman Adair, *id.*, at 104.

“Anglo-American criminal law is rooted in the principle that the accused may be tried only by his fellow citizens and only by those citizens who reside near the scene of the alleged crime. Here we are concerned with the rights of Americans in a military rather than a civilian community. In essence, however, the same principle is involved. Shall Americans subject to the jurisdiction of the United States be tried by other Americans who live in the vicinity of the scene of the alleged crime?” Senator Bricker, 99 Cong. Rec., 8741 (1953).

⁴² Congressman Rodino referred to “[T]he handicap of his being tried in a foreign country. First, he is not fluent in the language, even though he may have some knowledge of that in which he is being tried. He is in a land of nationals foreign to him in every sense of the word. Their customs, their laws, their attitudes are strange to him.” Hearings, H.J. Res. 309, *supra*, note 1, at 66.

the receiving state and local officials who may be involved, it has the great disadvantage that the judges and prosecutor may not speak their language.⁴³ Serious offenses against the local law normally involve some local residents; even minor offenses, e.g., traffic violations, involve at least the arresting officer. The issue is more than one of convenience, since it goes to the fairness of the trial, from the standpoint of all concerned.

A related issue is that of possible prejudice, reflected in the manner and diligence with which the investigation and prosecution are pursued, in the way in which the trial is conducted, in the verdict, and in the severity of the sentence. Fear has been expressed that prejudice against foreigners, and particularly against American troops, would be shown in trials of members of our forces in foreign courts.⁴⁴ There is, of course, a possibility of prejudice in favor of the accused if the trial is before a court-martial of the sending state.

C. The Interests of the Receiving State

The status of forces problem requires more than gauging the significance of such concepts as the equality and independence of states and weighing the demands of military exigency and of protection of the individual. These must be balanced against the legitimate interests of the receiving state.

⁴³ Judge Brinton, referring to the cases which arose in Egypt in World War II, said: "Indeed practical considerations suggest strong reasons in favor of the exercise of the civil authority. The offenses in question were, by their very definition, committed outside the military precincts and invariably involved, or were directed against, members of the civilian population. They also involved the intervention of the local police and the setting in motion of those measures of immediate record of the facts recorded in an official *procès-verbal* which forms, in general, such an admirable feature of European criminal systems. For the most part they have been brawls and shootings in the public street and in cafés, or robberies or other similar offenses affecting public peace and order, where the language used by the available witnesses has often been one with which the military authorities are unfamiliar. The difficulties presented by the trial of such cases by a court-martial remote from the scene of the offense are obvious." Brinton, "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946).

⁴⁴ "Their attitudes are bound to be unsympathetic to a transgressor in their midst. Moreover, the very presence of our troops abroad causes irritations." Cong. Rodino, Hearings, H.J. Res. 309, *supra*, note 1, at 66; see also comments of Senator Long, 99 Cong. Rec., 8778 (1953); and Senator Hendrickson, *id.*, at 8738.

It will be recalled that primacy is normally accorded the territorial principle. Anglo-American law in particular is rooted in this concept. The receiving state therefore can stand upon the strongest of the recognized bases of jurisdiction in claiming jurisdiction over visiting forces. A major factor in this approach has been the idea that the maintenance of order within its borders is one of the highest functions of the modern state, and, by necessity, peculiarly its function. Any state is understandably reluctant to entrust the protection of the lives and property of its citizens to a foreign state. States have generally been prepared to show such trust unqualifiedly only in cases involving heads of states and diplomats accredited to them. Other representatives may enjoy immunity for criminal acts done in the performance of official duty, but that such immunity exists is at best debatable. All other immunities are hedged about with qualifications which, in general, reflect the recognition of the interests of the territorial state, particularly its basic right to protect the persons and property of its citizens.

Attitudes with respect to the status of land forces have been largely influenced by this fundamental consideration.⁴⁵ The misgivings of receiving states asked to concede exclusive jurisdiction over visiting forces have been met by recognition of the moral if not the legal obligation of the sending state to punish for violations of local law.⁴⁶ There is no claim that visiting forces

⁴⁵ “* * * [I]t is the protection of our own nationals which is being confided to their criminal jurisdiction.” Mr. Garro Jones, in the debate on The United States of America (Visiting Forces) Act, 382 H.C. Deb. (5th ser.) 886, (1942).

“We are reducing ourselves to the position in which certain countries were put by us under the Capitulation Treaties.” Mr. Clement Davies, *id.*, at 894.

“I am not willing as a United States citizen to have foreigners in this country not subject to our laws, when they are not on official or diplomatic duties. I want them tried by United States courts for the protection of United States citizens.” Congressman Fulton, Hearings, H.J. Res. 309, *supra*, note 1, at 89.

⁴⁶ General Walter Bedell Smith, Under Secretary of State, referred to the need “to ensure that the people of the countries who receive troops are protected with respect to their lives, their property and their security from the illegal activities of foreign troops or civilians.

“It is a problem which always confronts us when we are operating in allied countries. During the war it is met by stern measures. In time of peace we have to apply all the legal safeguards which we ourselves, as a

should be free to violate the local law at will.⁴⁷ The situation sometimes met in extradition cases, where a state refuses to extradite its own national even though it is unable or unwilling to try him under its own law, is not likely to arise.

The courts-martial of a sending state cannot, of course, directly enforce the laws of the receiving state. When the United States exercised extraterritorial jurisdiction in China, this raised a major problem, for it was not clear what laws of the United States could be considered as applicable to conduct in China. Nor was there any general rule that any violation of Chinese law was a violation of American law.

Today, the situation with respect to American troops abroad is quite different. Not only are many acts made criminal if com-

nation, feel necessary for its citizens." Hearings Sen. For. Rel. Com. NATO Treaties, *supra*, note 3, at 3-4.

Colonel King commented: "It goes without saying that it is the right and duty of the government of the host country to make sure that the persons and property of its nationals are effectively protected against crimes by members of the visiting forces, and that the latter's immunity from prosecution in the local courts is not used as a cloak to enable them to commit such crimes with impunity. In the several expeditionary forces which the United States sent to friendly foreign countries in the first World War and in others, the military and naval officers in command have always been ready to prosecute before their own courts-martial any member of their own forces against whom the local authorities (or any individual national of the host country) presented *prima facie* evidence of having committed a crime or offense." *Op. cit. supra*, note 2, at 558.

The United Kingdom, in the Exchange of Notes which preceded the enactment of the United States of America (Visiting Forces) Act, 1942, stated as one of the points on which it was indispensable first to reach an understanding, that the American authorities would assume responsibility for trying and on conviction punishing those who were alleged on sufficient evidence to have committed criminal offenses in the United Kingdom, *infra*, page 130, n. 51.

⁴⁷ "This problem is one with which the Navy has dealt with since the Revolution, the fundamental policy being that individuals in another country must abide by the laws and customs of that country and that extradition or release from foreign jurisdiction is a matter of arbitration in each case." Admiral Carney to Secretary of Defense Wilson, quoted at 99 Cong. Rec., 8770 (1953). The statement goes further, of course, and assumes the receiving state has concurrent jurisdiction to enforce. It should be noted that the United States of America (Visiting Forces) Act, 1942, was carefully drafted to grant the American forces immunity only from the enforcement jurisdiction of the British courts, not to exempt them from the obligation to obey British laws. *Infra*, page 129.

mitted by a member of the armed forces, wherever he may be, but most though not quite all violations of the local criminal law are offenses under the Uniform Code of Military Justice. This does not resolve all difficulties, however, and neither are all the objections of a receiving state answered. The sending state exercises jurisdiction through courts-martial, which may, and normally do, sit in the receiving state. They may, indeed, be required to do so in some cases.⁴⁸ This meets one of the basic objections to the exercise by a state of jurisdiction over offenses committed abroad because the difficulty involved in the transportation of witnesses or use of written statements is reduced. The effective exercise of jurisdiction requires, however, the power to investigate, arrest, summon witnesses, punish for contempt, and the like. No state is likely to permit the military authorities of the sending state to exercise such power over local residents, and it certainly cannot be required to do so.

This difficulty can be overcome in part by arrangements for enlisting the cooperation of the local authorities, but trial by the sending state still means trial by court-martial. This is not the place for an appraisal of courts-martial, or specifically, American courts-martial, as legal institutions. It is true they are not civil courts, or constituted as civil courts are constituted, but is this relevant to the problem? For some it is, since it raises the issue of the supremacy of the civil authorities over the military. In the United Kingdom, and elsewhere in the Commonwealth, it is a fundamental constitutional principle that a member of the British armed forces is subject to the jurisdiction of the civil courts for any offense against the civil law, in war and peace. Even conviction by a court-martial and the serving of any sentence imposed by it does not preclude trial and sentence by a civil court for the same offense.⁴⁹ The rule in the United States is that

⁴⁸ Both the United States of America (Visiting Forces) Act, 1942, of Great Britain 5 & 6 Geo. 6, C. 31 and our own Service Courts of Friendly Foreign Forces Act, 22 U.S.C. 702 (1944), required trial in the vicinity if the offense was against a civilian.

⁴⁹ Professor Goodhart, in "The Legal Aspect of the American Forces in Great Britain," 28 A.B.A.J. 762, 763 (1942), wrote that: "* * * [T]he important constitutional principle * * * involved is one of the essential ones on which the English constitution is based. It is described by Dicey as 'the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary

courts-martial and the civil courts have concurrent jurisdiction, although this may not be a constitutional requirement.⁵⁰ In most European countries the jurisdiction of the military authorities over the armed forces is exclusive.⁵¹

The risk against which the British constitutional principle is

citizen.' It is part—and perhaps the most important part—of 'the rule of law' which is the distinctive feature of the British system. 'It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first, of "equality before the law," which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and secondly, of "personal responsibility of wrongdoers," which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors.' This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for any one to establish a military dictatorship in Great Britain."

Professor Goodhart traced the history of the principle, noting a statute of 1399 (1 Henry IV, c. 14); a provision of the Petition of Right (1625); the vigorous opinion of Lord Chief Justice Hale in the Case of Captain C [(1673) 1 Ventris 251] in which he said that "It seems you are grown very headstrong: that you who ought to know, that every officer and soldier is as liable to be arrested as a tradesman. * * * You are the King's servants, and intended for his defence against his enemies, and to preserve the peace of the Kingdom, not to exempt yourself from the authority of the laws. * * * Whatever you military men think, you shall find you are under the civil jurisdiction, and you but gnaw a file, you will break your teeth ere you shall prevail against it;" and the Mutiny Act of 1689, which said that: "Provided always, That nothing in this Act contained shall extend or be construed to exempt any Officer or Soldier whatsoever from the ordinary processe of Law."

The principle, Professor Goodhart adds, has been so strictly maintained that the doctrine of "autrefois convict" does not derogate from it, although a soldier tried by a civil court cannot be tried for the same offense by a court-martial. Moreover, the principle is not affected by war or insurrection.

⁵⁰ "Courts-martial have exclusive jurisdiction of purely military offenses. But a person subject to the code is, as a rule, subject to the law applicable to persons generally, and if by an act or omission he violates the code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil tribunal, and in some cases before both. * * * The jurisdiction which first attaches in any case is, generally, entitled to proceed." Manual for Courts-Martial, United States, 1951, p. 16. See also Lt. Comd. Griffin, "Trial by Civil or Military Courts," JAG J. 11. (July 1948).

⁵¹ Goodhart, *op. cit. supra*, note 59, at 762.

directed is, as Professor Goodhart says, abuse of the civil rights of civilians and subversion of the government by the military. Giving the concept the status of a constitutional principle accents the significance attached to it. The principle was, however, formulated with reference to a state's own armed forces. It can be argued it has no relevance to the status of visiting armed forces. A majority of the Canadian Supreme Court, however, held it applicable to visiting armed forces.⁵²

⁵² "I have no doubt that this principle applies to all armies, British or foreign, except in cases in which, as by the legislation mentioned dealing with the American forces in England, it has been changed by legislative enactment, or the equivalent thereof. There can be no doubt that in Great Britain it is settled as indisputable that this is a principle of law applicable in strict law to all armies there, except in so far as it has been modified by statute.

* * * * * *

"I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of the law of every Province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country." Sir Lyman P. Duff, C.J.C., in *Reference re Exemption of U.S. Forces from Canadian Criminal Law* [1943] 4 D.L.R. 11, 16, 21.

Hudson, J., concurred in the opinion.

Rand, J., in a separate opinion, said:

"There is no doubt that constitutional principle in England has for several centuries maintained the supremacy of the civil law over the military arm. If that principle meets the rule of immunity to foreign forces arising in the circumstances stated, then the latter must give way. The principle is intended to maintain a nation of free men through an equality before the law and a common liability to answer to the same civil tribunals. The citizen taking on the special duties of a soldier abates no jot of that accountability. The independence of that law and its courts in the armed forces would open the way to military domination and the loss of that freedom which equality secures.

"Can that principle be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on our soil? It is, of course, not foreign but domestic military usurpation against which the principle is a bastion and it might strongly be argued that the objection to conceding such a jurisdiction is not that it is military but that it is foreign. But I have come to the conclusion that that principle stands in the way of implied exemption when

Whether that judgment was correct or not, the fact that states like the United States and Great Britain give their civil courts concurrent jurisdiction over their own armed forces has some bearing on the persuasiveness with which such a state can argue that its armed forces must always be under the exclusive control of their commander. A significant distinction in terms of control exists between subjecting the members of a state's armed forces to the jurisdiction of that state's civil courts and acquiescing in the exercise of jurisdiction over them by the civil courts of a foreign state. Yet the fact remains that a state whose armed forces are subject to the jurisdiction of its civil courts cannot, as a sending state, argue with complete impunity that military necessity demands they be immune from the jurisdiction of foreign civil courts. When in the position of a receiving state, such a state is likely to be reluctant to accord immunity from its jurisdiction to visiting forces.

Courts of a sending state are not only courts-martial; they are, by definition, foreign courts operating under a foreign system of law. This runs counter to a principle, related to but broader than the British constitutional principle referred to, and widely shared. It is the belief that all those within the territory of the state—citizens or aliens, soldiers or civilians—should be answerable to and be protected by the same courts administering the same law.⁵³ Any departure, for any group, whether it gives them a

the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle by the Parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public: *Cheung case (supra)* and the memorandum of Sir Alexander Cockburn in the Report of the Royal Commission on Fugitive Slaves quoted therein." *Id.*, at 49–50. Cf p. 128, *infra*, no. 43; p. 131, *infra*.

⁵³ A guest editorial from The Times Weekly Edition, London, Aug. 5, 1942, in 28 A.B.A.J. 679, said: "For centuries it has been a fundamental principle of English law that all charges relating to crime alleged to have been committed within the realm, whatever the nationality or condition of

more or less favored position, may be met with objections.⁵⁴ The depth of conviction with which the view of the objectors can be

the person accused, are matters for the determination of the King's courts alone."

In the debate in the House of Commons on the Bill to implement the NATO Agreement, Mr. Eric Fletcher said, 505 H.C. Deb. (5th ser.) 586 (1952): "[M]embers of the visiting Forces and their civilian components will be able to commit crimes which cannot be tried in the courts of this country. That is something which, *prima facie*, shocks those who have been brought up to respect the deep-seated constitutional principle of this land.

"* * * They will only be answerable for their crimes to the exclusive jurisdiction of foreign service courts. There has not been anything like that in this country since the Middle Ages, when a certain section of the community could claim benefit of clergy, and when there was a certain Papal jurisdiction which could defeat the claims of the English common law courts.

"[It] must be somewhat humiliating for those who have always believed in the paramountcy of the British courts in trying and bringing to justice any and every crime committed in this country."

Sir Frank Soskice, in a later debate, said: "From the point of view of the ordinary person, that which is the most surprising and perhaps least pleasing is the fact that an American citizen can, while in this country, commit grave offences and, nevertheless, not be subject to the jurisdiction of our own criminal courts. We are, by long tradition—as are most other countries—used to the concept that our criminal courts have jurisdiction over all offences committed within our territory * * *.

"They [inter se and on duty offences] include a very large number of serious offences—murder, rape and that sort of thing. It shocks ordinary persons and is, *prima facie*, surprising to them that our own criminal courts should not be able to try all persons who, within the jurisdiction of those courts, commit those offences." 526 H. C. Deb. (5th ser.) 1290 (1954).

⁵⁴ "Exclusive criminal jurisdiction, amounting to extraterritoriality, itself creates difficult problems. In the eyes of the local population, it sets Americans apart as a special, privileged class, and this fact acts as a constant irritant. If American courts-martial return verdicts of acquittal, or if they impose sentences which seem lenient to the aggrieved parties, they are open to charges of favoritism. If, on the other hand—as has sometimes happened—they impose sentences substantially greater than those provided by local law for the same crime, they can be accused of flouting local customs and sensibilities. Regardless of how fair and just American courts-martial may be, the existence of exclusive criminal jurisdiction seems to the other country to be an infringement of its sovereignty." Letter of General Walter Bedell Smith, Under Secretary of State, to Senator Wiley, 99 Cong. Rec., 8777. (1953).

Two amendments to the Bill to implement the NATO Agreement were discussed in the House of Commons, one to prohibit a sentence "not permitted by the law of the United Kingdom" and the other "Provided always that no one shall be punishable within the United Kingdom for an offence

held and the vigor with which it can be expressed are shown in the *Ranollo* case.⁵⁵ Such view is the cornerstone supporting the principle of territorial jurisdiction.

The preceding discussion suggests these general conclusions: Military exigency requires that a state have jurisdiction to prescribe rules with respect to the conduct of its armed forces abroad, and also that it have enforcement jurisdiction in the receiving state. Exercise of such jurisdiction must not be subject to any or, possibly, only the most limited supervisory jurisdiction of the receiving state. All of this is essential if the commander is to maintain that discipline which is required if the force is to be effective in ensuring the security of the state. It is not, however, by any means clear that military exigency requires that the sending state have exclusive jurisdiction over its forces. There

based upon racial discrimination." Neither was adopted. 505 H.C. Deb. (5th ser.) 1122, 1126, 1145, 1146 (1952). The NATO Agreement, Art. 7(a), provides: "A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case."

⁵⁵ *Westchester County v. Ranollo*, 187 Misc. 777, 67 N.Y. Supp. 2d, 31; 41 A.J.I.L. 690 (1947). In rejecting the argument that all personnel accredited to the United Nations were immune, the court said: "To recognize the existence of a general and unrestricted immunity from suit or prosecution on the part of the personnel of the United Nations, so long as the individual be performing in his official capacity, even though the individual's function has no relation to the importance or the success of the Organization's deliberations, is carrying the principle of immunity completely out of bounds. To establish such a principle would be in effect to create a large preferred class within our borders who would be immune to punishment on identical facts for which the average American would be subject to punishment. Any such theory does violence to and is repugnant to the American sense of fairness and justice and flouts the very basic principle of the United Nations itself, which in its preamble to its Charter affirms that it is created to give substance to the principle that 'the rights of all men and women are equal.' * * * It is only by a proper distinction of the immunity to be accorded to the personnel of the United Nations and by a proper circumscription of the effect to be given the Congressional language that the American people can be assured that the hospitality accorded the United Nations on American soil will not be abused by conduct on the part of even the humblest of its personnel in a manner that is hostile to the American concept of the equal administration of justice among our people. This Court feels strongly * * * that such immunity should be available only when it is truly necessary to assure the proper deliberations of the Organization * * *."

is substance to the argument that a commander must have exclusive control over the force, particularly now that modern weapons and technology have made reaction time so short. Against these considerations must be set the very real considerations supporting the territorial principle and hence jurisdiction in the receiving state. To these must be added the fact that any exercise of jurisdiction by one state in the territory of another is inevitably less than wholly effective because of certain inevitable limitations, and account must be taken of considerations supporting civil jurisdiction over the military. A balance between opposing factors is not easy to strike, and the proper decision may well vary with circumstances. In time of peace, however, the balance appears to be on the side of concurrent jurisdiction in the receiving state.

It is quite clear, on the other hand, that the interests of members of the armed forces, as individuals, are not a relevant consideration. Immunities are accorded to protect the interests of the state, not the individual. A member of a visiting armed force is, like any citizen, entitled to the protection of the ordinary rules of international law concerning the denial of justice, but not, as an individual, to any further protection.

CHAPTER VI

THE PRACTICE OF STATES UP TO 1945

England, the Canal Zone, Saudi Arabia, Formosa, Germany, Morocco, Iceland, Iran, Australia, India, Greece, France, Spain, Turkey, Italy, Korea, Bermuda, Brazil, Liberia are only some of the places where American forces have been stationed during the twentieth century. This list alone suggests the remarkably diverse situations in which American troops abroad have found themselves—and each situation has differed not only in the simple terms of war and peace. Even in war, they have been in combat zones, zones of communication and zones of the interior, far from the arena of actual fighting. They have occupied sectors of a front, served as garrisons, been in training or in passage, or manned naval or air bases. They have lived among the local inhabitants or have been quartered in geographically separate areas, at times have drawn heavily upon the local economy and at other times have been supplied largely from the United States. Similarities or differences in language and culture have led to much or little intermingling with the local inhabitants. These and other factors have appeared in entirely different combinations.

If the circumstances in which troops may be stationed in a friendly foreign country can vary over such a wide range, presumptively the demands of military exigency, as applied to them, can vary over a like range. There is no reason to assume that the implications of this are less significant with regard to problems of jurisdiction than with regard to other problems. Moreover, “jurisdiction” and “immunity” are also relative terms, and there is need to distinguish between jurisdiction to prescribe, jurisdiction to enforce, and supervisory jurisdiction; between concurrent and exclusive jurisdiction; between immunities for official and for private acts; and so on. Finally, problems of jurisdiction and of immunities cannot be decided by considering only the interests of the sending state, even when those interests center around security and military exigency. These must be weighed against those of the receiving state, and a balance struck.

Governments, perhaps more than text writers, have been aware of these differences. That awareness has militated against the acceptance by governments of a rule of international law according complete immunity from the local criminal law to visiting foreign forces in every situation. Rather they have preferred, by legislation or treaty, to grant, limit, or deny immunity, depending on the particular situation.

Marshall's observation in *The Schooner Exchange* referred specifically to troops in passage. It was only in later dicta of the Supreme Court¹ and in the comments of writers that the asserted immunity was extended to troops stationed in a foreign country. The distinction is too significant to be ignored.² Marshall himself

¹ *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878). *Dow v. Johnson*, 100 U.S. 158, 165 (1879).

² "Finally, the Chief Justice expressly limited his remarks about the exemption of the foreign forces to troops in passage. Completely different considerations determine the immunity which must necessarily attend passing troops on, as the Chief Justice evidently envisioned it, a mission of urgency and immediacy, perhaps never to return via that country, and troops stationed in a friendly state in time of peace for an indeterminate period. The path of troops en route was, in Marshall's day, a narrow, clearly defined avenue. Presumably, the path of the march was completely within the control of the troop commander. It might very well have been considered that such troops, in transit, were constantly on duty. On the other hand, today's troop locations are dispersed throughout the receiving state and place the individual soldier in necessary daily contact with the local residents. The control which the commanding officer has over every individual action of the troops is naturally far less than that exercised over troops on the march, or quartered in a temporary camp for the night. Completely different problems pertaining to criminal jurisdiction over the members of the forces necessarily arise out of these different circumstances." Statement of Attorney General Brownell, 99 Cong. Rec., 8767 (1953). See also the statement of Assistant Attorney General Rankin, Hearings on H.J. Res. 309, Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 264 (1955).

Senator Ferguson observed that Marshall "spoke of 'the free passage' of troops and the 'waiver of all jurisdiction over the troops, during their passage.' This has to do with the movement of troops, somewhat analogous to the shipment of goods in bond from one country to another through the territory of a third. Marshall could not, in 1812, have conceived of a situation in which large numbers of troops would be stationed for long periods of time in the territory of friendly foreign powers under a multilateral agreement for mutual defense." 99 Cong. Rec. 8759 (1953). See also *id.*, 8733, remarks by Senator Knowland.

The Restatement, *Foreign Relations Law*, makes the distinction, stating in

said: "It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed."³ The danger referred to may be as much to the constituted government as to the inhabitants. The inconvenience and injury is presumably that borne principally by the inhabitants. The risks thus implicit in the passage of troops are clearly less than those involved when troops are stationed in a country. If troops are in passage they may well follow a clearly defined route, be under the more immediate control of their officers and mingle less with the inhabitants than when they are spread through the country. Again, the time they will be in the country may be limited, a factor which bears both on the risk to the local inhabitants and the inconvenience to the commander if one of his men is arrested by the local authorities.⁴ The analogy which suggests itself is that to a warship in a foreign port.

The line between troops in passage and those stationed in a country is not easy to draw, much less easy today than in Marshall's time. All the American ground troops in England (and the same was true in some other areas) in both World War

Section 61, p. 192, that: "Except as otherwise expressly indicated by the territorial state, its consenting to the passage of a foreign force through its territory implies that it waives its right to exercise enforcement jurisdiction over the members of the force for violations of the criminal law of the territorial state during the passage, and the passage implies that the sending state agrees to take punitive action." Presumably, the term "passage," as used in this Section, is to be narrowly defined. See Comment a, at 193, which states in part that "In the case of a force in passage * * * the purposes of both the sending and territorial states are *to expedite and facilitate a rapid transit* in order that the force may proceed on its mission." (Emphasis added.)

³ *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 140 (1812).

⁴ It was suggested that if individuals stray from the main body they should no longer enjoy immunity. See Taylor, *Inter. Public Law* 230 (1901). Woolsey said: "If we are not deceived, crimes committed along the line of march, away from the body of the army, as pilfering and marauding, authorize arrest by the magistrates of the country, and a demand at least, that the commanding officers shall bring such crimes to a speedy trial." *Inter. Law* 102 (4th ed., 1875). In 1 *Pitt-Corbett's Cases on International Law* 274 (5th ed., 1931), the editor remarked that "in the case of offences committed outside the line of march or away from the main body, the punishment of the offender may, and perhaps should, be left to the local authorities."

I and World War II were, in a sense, in passage. They were nevertheless there for long periods and a part of their training was received there. This is a far cry from the situation when the United States allowed Britain to move troops over the Grand Trunk Railway to Canada,⁵ or when Mexican troops were permitted to pass through American territory to lower California to quell a rebellion.⁶ It was presumably the latter kind of passage of troops which Marshall had in mind, and he might well not have taken the same view of the situation of American forces "in passage" through England. This is another way of saying that even troops in passage raise many problems that cannot be solved by a single simple rule.

A friendly army may also enter an area by force of arms in order to liberate, as the allied armies entered Western Europe and other territories in World War II. The necessity that the commander of the liberating army exercise complete control over the forces under his command, and perhaps over the civilian population as well, may be as compelling as if the occupation were of hostile territory. Furthermore, in this situation the "receiving" state has jurisdiction only in a theoretical sense. In fact, its power to exercise jurisdiction may have ceased to exist and been superseded by that of its conqueror. Practically, that power cannot be restored until the territory has been liberated and the civil government reconstituted. The agreements made with governments-in-exile in World War II, giving the commander of the liberating armies such jurisdiction as in his discretion he believed it necessary to exercise and contemplating only a gradual shift of jurisdiction to the civil authorities, recognized the practical necessities of the situation.⁷ If such agreements had not been made, the commander would have had to exercise the same power, and where they were not, he did so.⁸

⁵ Fiore, *Nouveau Droit International Public* 468 (2d. ed. Antoine transl. 1885).

⁶ 99 Cong. Rec., 8733 (1953) (remarks by Senator Knowland).

⁷ See Agreement between the United States and Norway of May 16, 1944, 67 U.N.T.S. 254 (1950).

Similar agreements were made on the same day between the United Kingdom and Belgium, 90 U.N.T.S. 284 (1951) and on August 25, 1944 between the United States and France, 138 U.N.T.S. 248 (1952). All the agreements related to the Allied forces, not simply to those of the United States or Great Britain.

⁸ "Everywhere else in Europe, on the Continent, and in Africa, we en-

In World War I a comparable, though not identical, situation obtained when the respective Allied armies each occupied an assigned sector or sectors in the combat zone. These were not only areas of actual military operations, but in varying degrees the civil population had been evacuated and the civil authorities had ceased to function. The combat zone never, it is true, extended to large areas of France (or Italy) nor had the civil authorities ceased to function outside the combat zone, but France, apart from the combat zone was, in military terms, a zone of communications. The Allied forces were largely in the combat zone in the early stages of the war but this became less true, particularly of the American forces when they arrived in large numbers.

A series of agreements between France, Belgium and their allies regulated the status of the Allied forces in World War I. There has been much debate⁹ regarding the implication of these agreements with respect to whether international law recognizes the immunity of visiting forces from the local criminal jurisdiction.

The first of these agreements, the Franco-Belgian Agreement, of August 14, 1914¹⁰ was patently designed, at least primarily,

tered by force of arms, either as liberators or as conquerors, or as a combination of the two, depending on how you would interpret it and we interpreted it as we saw fit.

“* * * So we established civil law during the time we were there by force of arms, either as unwelcome or welcome guests; we maintained extra-territoriality or we had it granted without argument.” General Walter B. Smith, Under Secretary of State, Hearings before the Senate Foreign Relations Committee, 83rd Cong., 1st Sess. 23 (1953).

S. Exec. Rpt. No. 1, (Senate Foreign Relations Committee) 83d Cong., 1st Sess., 1 Amer. For. Policy 1950-1955, 1561 at 1562 on the NATO treaties said that: “Everywhere on the Continent of Europe, however, United States forces entered during World War II by force, either as liberators or conquerors, and made their own laws.”

⁹ King, “Jurisdiction Over Friendly Foreign Armed Forces,” 36 A.J.I.L. 549, 551 (1942); Barton “Immunity From Supervisory Jurisdiction,” 1949 *Brit. Yb. Int’l. L.* 380, 387, 390.

¹⁰ Journal Officiel de la République Française, Dec. 4, 1914, Barton, *id.*, 388. The agreement, entered into “the better to assure the prosecution of acts prejudicial to the armies of the two nations,” provided that:

“The French and Belgian governments are in accord to apply, each in that which concerns it, the principle according to which each army retains its jurisdiction with respect to acts capable of prejudicing it, whatever the territory where it is found or the nationality of the

to deal with offenses against the troops by civilians rather than by troops against the civilian population and thus accents the similarity between the Allied armies and an army of occupation by consent, responsible for the administration of a particular area. More than a year later, on December 15, 1915, when the British forces had been in France for nearly two years, an Anglo-French treaty was concluded.¹¹ This Anglo-French Declaration, unlike the prior Franco-Belgian agreement, specifically provided for the exclusive jurisdiction of the sending state over its armed forces but also—and practically this was the important provision—negated the jurisdiction of the sending state over all persons not members of that force. The Anglo-French agreement was the model for agreements between France and Belgium, Serbia, Italy and Siam¹² and for the Franco-American Agreement of January 1918.¹³ The latter agreement, although some-

culprit. In derogation of this principle it is understood that Belgian nationals guilty of acts prejudicial to the French army will be delivered to the Belgian authorities to be tried by them according to the laws of Belgium: in French territory, the Belgian army will apply as occasion requires this same rule."

¹¹ The agreement took the form of a joint Declaration (London Gazette, Dec. 15, 1915), Foreign Rel. U.S. (Supp. 2) 735 (1918). The Declaration read in part:

"His Britanic Majesty's government and the Government of the French Republic agree to recognize during the present war the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to those Armies in whatever territory and of whatever nationality the accused may be.

"* * * The two Governments further agree to recognize during the present war the exclusive competence in French territory of French justice with regard to (persons not belonging to) the British Army who may commit acts prejudicial to that Army and the exclusive competence in British territory of British justice with regard to (persons not belonging to) the French Army who may commit acts prejudicial to the said Army."

The translation quoted reads, where parentheses appear above, "foreign persons in" but this is an obvious mistranslation of the French original "*des personnes étrangères a.*" The phrase "persons not belonging to" appears in the Franco-American Agreement, Foreign Rel. U.S. (Supp. 2) 737 (1918).

¹² Chalufour, *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914-1918*, 51 (1927).

¹³ Exchange of Notes of Jan. 3 and Jan. 14, 18, Foreign Rel., U.S. (Supp. 2), 737 (1918).

what more precisely phrased, was in substance the same as the Anglo-French agreement.¹⁴

The agreements were made well after the allied armies arrived in France. It appears that immunity had nevertheless been accorded these troops before the agreements were made.¹⁵ This is said to have been prompted by French recognition that they were entitled to that status under international law.¹⁶ The agreements were consistently respected by the French authorities.¹⁷ They were later cited in the British Parliament as evidence of the rule of international law and as justifying the grant of comparable

¹⁴ See also the Belgian American Exchange of Notes of July 5, 1918 and September 6, 1918, *id.*, at 747 and 751.

¹⁵ Miss Chalufour states that the substance of the Anglo-French declaration had been agreed upon at a conference held March 19–23, 1915; “[I]t seems surprising that six months and a half of continued presence of the British troops on French soil should have preceded the appearance of an official declaration on the matter, but inquiry * * * revealed that the practice for the first months coincided with the principle published in the Declaration of December 15, 1915.” Chalufour, *op. cit. supra*, note 12, at 50.

¹⁶ Colonel King quotes (36 A.J.I.L. 549 at 550) the final report of August 19, 1919, of the Judge Advocate of the A.E.F., General Bethel:

“There had been received from France a bare invitation to send our armies to cooperate with hers without any agreement whatsoever as to the legal relations of the forces and as to the status of an American Army on French soil. On inquiry, however, at the French War Office, upon our arrival in France, it was found that the French view was precisely the same as our own; that under the general principles of international law members of the American Expeditionary Forces were answerable only to American tribunals for such offenses as they might commit in France. As the principle needed a somewhat broader scope, however, than its mere application to our Army in France, it was later agreed between the diplomatic departments of the governments that each should possess exclusive criminal jurisdiction over its land and sea forces whether in the territory of either nation or on the high seas.”

¹⁷ In *Ministère Public c. Bomans* the Tribunal Correctionnel de la Seine (10^e Chambre) held that a deserter from the Belgian army was not subject to the jurisdiction of the French court. Chalufour, *op. cit. supra*, note 12, at 63, Barton, 1950 Brit. Yb. Int'l. L. 186, 188. In *Ministère Public c. Pratt*, [1919–1922] Ann. Dig. 332 (No. 240), the lower courts had held they had no jurisdiction to try an American army captain charged with fraudulent misappropriation of goods to the prejudice of the French State although the defendant had been demobilized before the date of his arrest. However, the American authorities had intimated that the American military court had no jurisdiction and the Court of Cassation, reversing the lower court, held that since both governments had recognized that the agreement was not applicable, there was jurisdiction in the French Court.

status to allied troops in Britain.¹⁸ But even though these agreements recognized the exclusive jurisdiction of the sending state over its forces and may in this regard have been, at least in the American and French views, declaratory of international law, these attitudes were taken in the circumstances then existing in France and at least arguably in the light of those circumstances.¹⁹ Clunet, in commenting on these arrangements, compares, though he does not assimilate, the allied armies to armies of occupation ²⁰

¹⁸ During the debate on The United States of America (Visiting Forces) Bill, the Home Secretary, Mr. Morrison, said: "Moreover, even if we were disposed on the merits of the case to resist the claim of the Government of the United States, we should be in a rather poor debating position because we ourselves successfully made precisely the same claim in the case of British forces in France in the last war. * * *" But Mr. Garro Jones remarked that: "* * * I think it is rather misleading to suggest that this Bill follows the analogy of what was done in France in the last war. There the British troops were engaged in active combat service in zones which, with certain exceptions, were forbidden to civilian access, and although there was a certain number of British troops mingling with the French population, the degree of contact with the French civil population * * * was nothing like the degree of contact which the American Forces must inevitably have with the British population here." 381 H.C. Deb., (5th ser.) 877, 883 (1942). See also the comments of Mr. Davis and Dr. Thomas, *id.*, at 894 and 900.

¹⁹ The fact that it was deemed necessary to negative, partially in the Franco-Belgian Agreement and completely in the Anglo-French Agreement, the jurisdiction of the Allied military forces over those not in their armies, is significant. No one ever suggested the Allied military authorities had such jurisdiction in the United Kingdom and the problem is not touched in any of the agreements or statutes relating to allied forces in the United Kingdom. There is here seemingly a tacit assumption that the situation in France was distinguishable. See generally, the Reporter's Note to Sec. 62, Restatement, *Foreign Relations Law*, p. 197, relating to the effect of hostilities on criminal jurisdiction over forces.

²⁰ 45 Journal du Droit International, 1918. Barton states, 1950 Brit. Yb. Int'l. L. 186, 193, that in the north of Italy, where the British occupied a sector in the combat zone, the Italian government recognized the exclusive jurisdiction of the British service courts over the British armed forces; that it also recognized the right of the British service court to exercise jurisdiction outside the combat zone but strenuously maintained that offenders against Italian law were liable to be tried in Italian courts. He states the British government did not dissent but proposed an agreement comparable to the agreement that both Britain and Italy had with France but the war ended before it was signed.

The Supreme Court of the United States has drawn a like distinction with respect to the jurisdiction of courts-martial over civilian employees of

and there was reluctance on the part of the British to consider these agreements applicable in the United Kingdom in spite of their reciprocal provisions.²¹

Americans were the only foreign forces stationed in the United Kingdom in significant numbers in World War I. The British Government was reluctantly prepared to grant by treaty exclusive jurisdiction over the American troops to the American military authorities—it made it clear that it did not believe there was an obligation to do so under international law. It did indicate, nevertheless, that in its view the American troops were, under international law, entitled to immunity from the local criminal law for offenses committed within their quarters or camps.

Negotiations were initiated by a note of the Foreign Office dated September 5, 1917.²² The note conceded both American jurisdiction over its troops and their immunity from British jurisdiction “within the limit of the quarters occupied by them,” but expressly affirmed the jurisdiction of the British courts over offenses against British law committed elsewhere. Moreover, it not only denied the right of the British authorities, without

the armed forces and dependents. Thus, in Mr. Justice Black’s opinion in *Reid v. Covert*, 354 U.S. 1 (1957) at 34 he said: “While we recognize that the ‘war powers’ of the Congress and the Executive are broad, we reject the Government’s argument that present threats to peace permit military trial of civilians accompanying the armed forces in an area where no actual hostilities are under way. The exigencies which have required military rule on the battle front are not present in areas where no conflict exists.”

In a footnote, the Justice said: “*Madsden v. Kinsella*, 343 U.S. 341, is not controlling here. It concerned trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces. In such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not.”

²¹ See Barton’s discussion, *id.*, at 189–91, of *Rex v. Aughet*, Court of Criminal Appeals, 34 L.T.R. (N.S.) 3021 (Cr. App. 1917–1918), the one litigated case regarding the status in the United Kingdom of a member of a foreign army of a country with which Britain had such an agreement.

Perhaps as significant is the remark of the Lord Chancellor in moving the second reading of The United States of America (Visiting Forces) Bill, when, referring to the Anglo-French Declaration, he said: “Apart from this legislation, there can be no doubt that in any such case [of an offense in the United Kingdom against the criminal law] there would be jurisdiction in the British Courts.” 124 H.L. Deb., (5th ser.) 61 (1942).

²² Foreign Rel. U.S., (Supp. 2) 733 (1918).

enabling legislation, to assist the Americans in enforcing military discipline²³ but also denied the right of the American authorities to exercise such jurisdiction outside the limit of their quarters²⁴ and proposed the issuing of an enabling regulation under the Defense of the Realm Act.²⁵

The American reply²⁶ did not challenge the assertion of the Foreign Office that "outside the limit of their quarters, however, they are liable to be dealt with by the English criminal courts for any offenses against the English law * * *." Rather, it suggested the desirability of a comprehensive reciprocal agreement, such as that between Britain and France, giving the sending state exclusive jurisdiction. This seems to imply that such an agreement was necessary to give exclusive jurisdiction. Furthermore, the reply stated: "It is doubtful, however, what effect the courts in the United States would give such an informal agreement," again implying that exclusive jurisdiction would not exist without an agreement.

²³ The right of the British authorities to arrest American troops for violations of military discipline was denied. This position was consistent with the rule that a state will not undertake to enforce the penal laws of another state. The note also denied that the British authorities could turn over to the American authorities those arrested for violations of British criminal law, although the practice in the case of the crews of warships was to the contrary.

²⁴ Specifically, to arrest for a military offense.

²⁵ "* * * [G]iving power to the British military authorities in general terms to make and revoke or vary orders from time to time for subjecting United States and other Allied troops in this country to their own system of military discipline and for arresting them and handing them over to their own military authorities * * * in case of any alleged military or criminal offense whether such offense was contrary to English law or not." The last phrase can be read as meaning it was contemplated the American authorities would, in practice, be given exclusive jurisdiction.

²⁶ Feb. 5, 1918, Foreign Rel., U.S. (Supp. 2) 739 (1918). The reply was directly to a second Foreign Office note—the first having gone unanswered—which indicated that the situation had become more urgent and suggested the need for legislation "which would at all events enable them [the American authorities] to compel witnesses to attend American courts-martial in this country." It also referred to the need for "empowering American Judge Advocates to administer oaths outside the precincts of camps or buildings specially allotted for the use of American troops. * * *" Jan. 18, 1918, Foreign Rel., U.S. (Supp. 2) 737 (1918).

The Regulation later issued makes it clear the reference was to compelling the attendance of and administering oaths to witnesses other than members of the American forces.

The Foreign Office reply to the United States forwarded a draft copy of a proposed regulation which with minor modifications became Regulation 45F of the Defense of the Realm Regulations,²⁷ and a draft Order of the Army Council. The regulation and order related only to the exercise of enforcement jurisdiction by the American authorities and to assistance to them by the British authorities, expressly excluding the exercise of supervisory jurisdiction by the British courts except on the issue of membership in a foreign force.

Thereafter the Foreign Office put forward a proposal that "in order to complete the arrangements * * * and to dispose of certain questions as to jurisdiction," a convention should be concluded similar to that between Britain and France, but that Great Britain—not the United States—should have exclusive jurisdiction over certain offenses.²⁸

²⁷ [1918] 1 Stat. Rules & Orders 332 (No. 367). The heart of the draft was in the first paragraph: "It is hereby declared that the naval and military authorities and courts of an Ally may exercise in relation to the members of any naval or military force of that Ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that Ally."

Paragraph 2 contemplated the issuance of orders authorizing the arrest of members of a foreign force "alleged to have been guilty of offenses" and handing them over to their military authorities to be dealt with "by the naval or military authorities or courts of the Ally according to the law of the Ally"; paragraph 3 authorized the competent British naval or military authority to issue orders requiring "any person not being a member of any naval or military force of that Ally" to appear as a witness or produce documents before a naval or military court of the Ally and made failure to comply an offense against the Regulations; paragraphs 4 and 5 made contempt or perjury by such a person an offense against the Regulation; paragraph 6 stated "It shall be lawful for a member of a naval or military [court of] an Ally * * * to administer oaths to witnesses."

Paragraph 9 is perhaps the most important of all the provisions, since it expressly negated supervisory jurisdiction of the British courts and left only the issue of membership in the visiting force for their possible adjudication.

²⁸ The offenses were: (a) Treason; (b) An offense against Official Secrets Act, 1911; (c) An offense against Defense of the Realm Regulations Nos. 18, 18A, 19A, 22A, or 27A, except where the offense is solely prejudicial to the armed forces of the United States of America; (d) An offense against Defense of the Realm Regulation No. 48 in relation to any offense above included.

This was not the equivalent of saying that the British should have jurisdic-

The reaction of the State Department was, for the first time in the negotiations, vigorous. "The note * * * is regarded by this Government as containing conditions which would create a very dangerous situation as regards the forces of this Government in British territory. The competent authorities of this Government are of the opinion that the result of entering into an agreement such as that proposed * * * would be a partial surrender by the American forces to the British Government of jurisdiction over the military forces of the United States located within British territorial limits *for offenses committed on American warships or in American camps*, and would involve the lack of proper recognition of the character and competency of the existing American military tribunals."²⁹ The reply concluded by suggesting an agreement modeled on that between the United States and France.

Thereafter the negotiations dragged on for a year and a half until, in January 1920, it was agreed that, the American forces having been withdrawn from Great Britain, no agreement was necessary. For a time it had appeared that an agreement giving the American authorities exclusive jurisdiction would be reached but there were also indications to the contrary.³⁰

tion where the offense violated British but not American law, since an act which constituted one of the enumerated offenses could be a violation of American law as well.

²⁹ July 17, 1918, Foreign Rel. U.S. (Supp. 2) 748 (1918). (Emphasis added.)

³⁰ There was no reply to the American communication of July 17, 1918, until December 9, 1918, when the Chargé advised the Secretary of State: "[The] Foreign Office inform[ed] me that British military authorities are prepared in deference to [the] wishes of the United States Government to agree to [the] omission," of the reservation of exclusive British jurisdiction in certain instances, as noted above, and inquired whether an agreement similar to that between France and the United States was desired. The same day the State Department replied in the affirmative, but nothing further transpired until June 5, 1919, when the British Government put forward a draft of a proposed agreement. The important paragraph stated that the two Governments agreed "to recognize during the present war the exclusive jurisdiction of the tribunals of their respective Armies with regard to persons subject to the military law of those Armies whatever be the territory in which they operate or the nationality of the accused." The proposal covered only those subject to military law, not to naval or air force law, as to which it would be necessary "to consult the Admiralty and the Air Ministry." The United States countered on August 13, 1919, with a draft which provided for "the exclusive jurisdiction of the tribunals of

With respect to these negotiations, it can be said: (1) Both the American and British negotiators assumed that the American military authorities had jurisdiction to enforce American military regulations within the quarters occupied by the American forces; (2) municipal legislation was, however, required to enable them to exercise police power outside those limits and to make available the assistance of the British authorities to arrest for violations of such military regulations, or to turn over members of the American forces arrested for offenses against British law, or to summon, swear, and punish for contempt or perjury, witnesses other than American troops, e.g., British subjects; (3) the provision of Regulation 45F barring supervisory jurisdiction of the British courts may or may not have been deemed necessary to preclude the exercise of such jurisdiction.³¹

There is no doubt that, as Barton suggests,³² the primary purpose of the negotiations was to ensure that the American authorities could exercise military discipline over American troops. Moreover, the desultory character of the negotiations after this had

their respective land and sea forces with regard to persons subject to the jurisdiction of forces whatever be the territory in which they operate or the nationality of the accused." "Persons" was defined to include "together with the persons enrolled in the Army, Navy and Marine Corps, any other person who under the American or British law is subject to military or naval jurisdiction, especially members of the Red Cross regularly accepted by the Government of the United States or the Government of Great Britain in so far as the American or British law and the customs of war place them under military or naval jurisdiction."

Four months later the Ambassador advised the State Department that he had learned "informally that upon the Foreign Office's referring the military convention proposal to the departments concerned, the latter have delayed replying upon the assumption that with the conclusion of peace the matter would lapse. The Foreign Office has conveyed to them its decision to reply to my representation no later than the 28th instant, but this answer will probably be unfavorable to the proposed convention." Thereafter, on January 30, 1920, the State Department acquiesced in the abandonment of the project.

Foreign Rel. U.S. (Supp. 2) 751, 752, 753, 755, 759, 760 (1918).

³¹ "Not only is that the recognized rule of International Law, but, in order that there should be no question raised at all when the American Forces did come over here in very large numbers in the period of the Great War, there was a regulation passed under the Defence of the Realm Act which stated in terms what their position was * * *." Viscount Hailsham, 86 H.L. Deb., (5th ser.) 482 (1932).

³² Barton, "Foreign Armed Forces: Qualified Jurisdictional Immunity," 1954 *Brit. Yb. Int'l. L.* 341, 343.

been achieved by the issue of Regulation 45F suggests that it was the only matter which either Government considered of compelling importance. The issue of exclusive jurisdiction in the sending state did, however, come into the negotiations and the positions taken are significant regarding the then attitudes of the two Governments. The American Government did not press the issue, perhaps because "so far as is recalled by officers of our Army who were in a position to know the facts, no trial of a soldier of the American Expeditionary Forces by a British court actually occurred." ³³

Between the wars, the enactment of the Statute of Westminster, changing the relationship between the United Kingdom and the Dominions, prompted the passage of The Visiting Forces (British Commonwealth) Act, 1933.³⁴ The legislation was recommended by a committee established at the Imperial Conference of 1926,³⁵ and the Act was intended as a model for comparable legislation in the Dominions.

Much has been made of the reference in the committee's report to "provision for the customary extra-territorial immunity." It has been said that since the Act did not grant immunity from the jurisdiction of the British criminal courts, Parliament must have believed no rule of international law required recognition of the latter immunity. The debate reflects, however, a sense of the

³³ King, *op. cit. supra*, note 9, at 553. But the Attorney General, in the debate on The United States of America (Visiting Forces) Act, 1940, stated that "We had American troops in the last war, and the Americans made exactly the same request that they are making today; it was only because the time was shorter, and that agreement was not come to, that Parliament was not asked to legislate on these lines. *But in fact American soldiers were dealt with by our courts, and they made exactly the same request.*" 382 H.C. Deb. (5th ser.) 929-30 (1942). (Emphasis added.)

³⁴ 23 & 24 Geo. 5, c. 6.

³⁵ "In connection with the exercise of extra-territorial powers, we consider that provision should be made for the customary extra-territorial immunity with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter. * * * We recommend that provision should be made by each member of the Commonwealth to give effect to such customary extra-territorial immunities within its territory as regards other members of the Commonwealth." Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, par. 44 (Cmd. 3479, 1930), Schwelb, "The Status of the United States Forces in English Law," 38 A.J.I.L. 50, 51 (1944).

distinction between the then relationship of the United Kingdom and the Dominions and that between independent sovereign states, which deprives the argument of much of its force.³⁶

The Bill, which drew heavily on Regulation 45F of the Defence of the Realm Regulations, contained two important provisions. Section 1(1) authorized the exercise of jurisdiction by the military authorities of visiting Commonwealth forces and Section 1(3) negatived the supervisory jurisdiction of the British courts, except on the issue of membership in the Dominion force. The debate related only to the necessity of the authorization,³⁷ and to the scope of the supervisory jurisdiction which the British courts should retain.³⁸ The Solicitor General alone, in supporting

³⁶ Sir Stafford Cripps, 275 H.C. Deb. (5th ser.) 1483, 1487 (1933); Lord Buckmaster, 86 H.L. Deb. (5th ser.) 486 (1932); Lord Atkin, 86 H.L. Deb. (5th ser.) 350 (1932). See also the letter of Lord Atkin in *The Times*, Feb. 8, 1933, in which he said: "It would surprise me to find that our Dominion fellow-subjects desire to be treated as foreign forces; or that any international lawyer would seek to apply the doctrines of extraterritoriality and diplomatic immunity to the relations of this country with the forces and representatives of the Dominions who owe a common allegiance to one Sovereign." See also *Wright v. Cantrell*. [1943-1945] Ann. Dig. 133 (No. 37); [1943] U.L.R. 185; [1943] A.L.R. 427, in which it was said: "No light is supplied by the Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, cap. 6), as this is concerned with domestic arrangements within the British Empire."

³⁷ It was common ground that Parliamentary authorization was necessary before Dominion military authorities could exercise jurisdiction. Viscount Hailsham, Secretary of State for War, 86 H.L. Deb., (5th ser.) 354, 355 (1932).

Earl Stanhope, Under Secretary of State for War, 85 H.L. Deb. (5th ser.) 808 (1932).

There was debate, however, as to whether such authorization was necessary before jurisdiction could be exercised when the forces of one independent sovereign were in the territory of another, the Government taking the view it was not. Sir Stafford Cripps, in opposition, said: "No Dominion has any right to send a court to this country and to administer justice here, unless it gets authority from the Crown, any more than any foreign state would have the right to do the same thing. The question to which objection is raised is not one of Dominion law, as I understand it; it is a question of English law, namely, whether a man is rightly imprisoned in this country." 270 H.C. Deb., (5th ser.) 1088 (1932).

But the Solicitor General, Sir Boyd Merriman, disagreed. See, however, Lord Croft, Joint Parliamentary Under-Secretary of State for War, 117 H.L. Deb. (5th ser.) 195 (1940).

³⁸ Opposition to the Act centered on the provision which deprived the

the Bill, ranged beyond the immediate issues and expressed the view that visiting armed forces were immune from the jurisdiction of the local criminal courts, while within their own quarters or lines.³⁹

British court of virtually all supervisory jurisdiction over the service courts and authorities of visiting Dominion forces. It was contended that the writ of *habeas corpus* should be available to one imprisoned by order of a service court, so that he might raise in a civil court the issue of whether the service court had jurisdiction and acted within its jurisdiction. The opposition wished to ensure that no one physically in the United Kingdom could be imprisoned without the right to appeal to a British civil court. The issue was of civil liberty, specifically the civil liberty of the members of the Dominion forces. Sir Stafford Cripps, 275 H.C. Deb. (5th ser.) 1112 (1933) and 275 H.C. Deb. (5th ser.) 1483 (1933); Sir Walter Greaves-Lord, 270 H.C. Deb. (5th ser.) 1083 (1932); Lord Atkin, 86 H.L. Deb. (5th ser.) 351 (1932); Viscount Hailsham, Secretary of State for War, 86 H.L. Deb. (5th ser.) 481-84 (1932). Lord Wright, in a dictum in *Amand v. Home Secretary* [1943] A.C. 147, 159, a *habeas corpus* proceeding brought where a Dutch subject was charged by the Dutch authorities with desertion from the Dutch forces said, however: "It is clear that the statutory provisions here in question (The Allied Forces Act, 1940) involve a peculiar interference with the freedom of a person resident in this country. He may under them be subjected to a special jurisdiction, no doubt similar to that to which a person subject to British military law is subject, but vitally different in that he is subjected to a foreign jurisdiction and code of law, that of the Dutch government enforcing its military law. There is, therefore, introduced a species of extraterritorial jurisdiction however limited, and the Dutch service courts are given jurisdiction to enforce their sentences. But *this jurisdiction is only possible so far as it is authorized by the British legislature* and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute. In particular, the British court must be satisfied that *the person in question is subject to Dutch military law and is, prima facie at least, an offender against that law. In these matters the British court has jurisdiction* and the person concerned is entitled to exercise all the rights which the British law affords to safeguard his liberty." [Emphasis added.]

³⁹ The Solicitor General, Sir Boyd Merriman, in several instances seemed to recognize the existence of a broader immunity but when pressed, said: "With regard to the American troops, it was a considerable time after they came to this country that the Defence of the Realm regulations were passed, and for this reason * * * that the principle of international law applies, as I understand it, to an organised body so long as it remains an organised body and if they are here by our invitation, they are exempted from our sovereignty while they are in their own quarters or lines. Manifestly, there are difficulties of defining exactly what these limits may be; and manifestly when you had hundreds of thousands of American troops in this country, it was necessary to have something more definite than the international prin-

On the whole, the enactment of The Visiting Forces (British Commonwealth) Act and the debate which preceded its passage indicate the British view was that visiting foreign forces (though not Dominion forces) were entitled to exercise jurisdiction over their troops free from the supervisory jurisdiction of the British courts. It cannot be said, however, that any indication was given that the British Government considered foreign forces entitled to immunity from the local criminal jurisdiction.⁴⁰ Even the remarks of the Solicitor General go no further than to suggest such an immunity for acts committed within their quarters or lines by foreign forces.

The Visiting Forces (British Commonwealth) Act served as more than a model for the Allied Forces Act, 1940,⁴¹ passed, after the fall of France, when the forces of the Allies⁴² had withdrawn to the United Kingdom. The Allied Forces Act authorized the ap-

ciple to which I am referring, and for that reason the Defence of the Realm regulations were passed, though some time after the American troops had begun to arrive in this country." 274 H.C. Deb., (5th ser.) 748 (1933).

At a later stage, when asked specifically whether "any visiting soldier or sailor, from whatever place he came, who had committed an offense would not be triable," the Solicitor General said:

"If the hon. Gentleman means that if one soldier or one sailor, staying away from the force of which he is a member, committed an offense against our laws, he would be triable, certainly; yes; but as long as he is here as a member of a visiting force and remains a part of that force, that force has exclusive jurisdiction over him." 275 H.C. Deb., (5th ser.) 1121-22 (1933).

⁴⁰ In a later debate the Home Secretary, Sir David Maxwell Fyfe, referred to the Visiting Forces (British Commonwealth) Act and the Allied Forces Act, 1940 and said: "These Acts did not make any specific provision for what was to happen when a member of a visiting force committed an offence which was an offence both against United Kingdom law and his own service law, and the question of which court was to exercise jurisdiction then was left to be settled by arrangement, much in the same way as in the case of offences by members of our own forces in this country which are offences both against military law and against civil law." 505 H.C. Deb. (5th ser.) 563 (1952).

⁴¹ 3 & 4 Geo. 6, c. 51.

⁴² That they "arrived not as fully equipped and perfectly organized units ready at once to move into and take control of a zone of operations in which they would continue the fighting, but rather as the broken and disorganized remnants of armies and air forces which had been seriously defeated," may, as Barton suggests, explain the status accorded them by the Allied Forces Act, 1940. Barton, *op. cit. supra*, note 9, at 401.

plication, by Order in Council, of much of the earlier Act to the forces of the Allies, including the provision granting service courts immunity from supervisory jurisdiction. The Act spelled out expressly the rights of the service courts and authorities of the Allied forces to exercise jurisdiction "in the United Kingdom or on board any of his Majesty's ships or aircraft" with respect to "matters concerning discipline and internal administration." Of more importance, it expressly negated immunity from the jurisdiction of the British civil courts for offenses against United Kingdom law and went even further to provide that if a person tried by a service court was afterwards tried by a civil court, the latter court should in according punishment take into account the punishment already imposed by the service court. This excluded any notion that the principle of *non bis in idem* was applicable.⁴³

The treaty with Czechoslovakia⁴⁴ provided: "Article 2. The offenses of murder, manslaughter, and rape shall be tried only by the criminal courts of the United Kingdom." The suggestion has been made that this provision was ineffective,⁴⁵ but for

⁴³ The Attorney General, Sir Donald Somerville, pointed out that this was true in the United Kingdom under the Army Act, and served to emphasize "the supremacy of the civil jurisdiction over the military." 364 H.C. Deb. (5th ser.) 1380-81 (1940). The issue is, however, certainly different where both a national and a court of another country are involved. In *Rex v. Aughet*, note 21 *supra*, the defense of *autrefois acquit* was in the same circumstances recognized. The Court there stated: "The provisions of our Army Act with regard to Courts-martial are based upon principles of high policy which have in our opinion no application to decisions of Belgian Courts-martial held pursuant to the Convention existing between the Allies."

The Act also provided, in Section 2(3): "A (service) court shall not have jurisdiction by virtue of the foregoing section to try any person for any act or omission constituting an offense for which he has been acquitted or convicted by any such civil Court as aforesaid." As Schwelb points out, this is British municipal law only, not binding on an Allied service court as such, except in the United Kingdom. Schwelb, "The Jurisdiction over the Members of the Allied Forces in Great Britain," *Czechoslovak Year Book of International Law*, 147, 168 (March, 1942).

⁴⁴ Annex III, British-Czechoslovak Military Treaty of October 25, 1940, quoted in Schwelb, *id.*, at 156. Barton states (*op. cit. supra*, note 20, at 197) that the Anglo-Polish Protocol of November 22, 1940; the Agreement with the Free French Authority of January 15, 1941; the Anglo-Norwegian Agreement of May 28, 1941; the Anglo-Netherlands Agreement of May 5, 1942, and the Anglo-Belgian Agreement of June 4, 1942 were similar.

⁴⁵ Barton states that "It has long been the custom in the United Kingdom for the civil courts to have exclusive jurisdiction over these grave offenses,"

present purposes it is significant that the United Kingdom, in entering into the treaty, felt justified in reserving not only concurrent jurisdiction with respect to crimes generally but also exclusive jurisdiction with respect to the three named offenses. The same attitude was taken in the House of Commons. An amendment to the Allied Forces Act was moved, for which a precedent existed in the Australian and New Zealand counterparts of The Visiting Forces (British Commonwealth) Act,⁴⁶ which would have denied the Allied service courts "the power to pass sentence of death, except for offenses for which a sentence of death could be passed upon a British subject."⁴⁷ In the debate on this amendment, ultimately defeated, the Attorney General made certain statements which have been said to show that the British recognized that international law accorded immunity from local jurisdiction to visiting armed forces. It seems, however, that at most the Attorney General conceded such immunity for offenses committed within the camps of the visiting forces.⁴⁸

The status of forces of the British Allies, other than the United States, continued to be governed through World War II by the Allied Forces Act. The United States was, however, unwilling to accept that status for its forces. Parliament on August 6, 1942 accordingly enacted the United States of America (Visiting Forces) Act, 1942,⁴⁹ in implementation of an agreement evidenced by an Exchange of Notes of July 27, 1942.

The crucial provision of the Act stated: "(1) Subject as hereinafter provided no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America." The Foreign Minister's Note and the debate in Parliament make it abundantly clear that His Majesty's Government believed it was going well beyond the dictates of

but that the restriction in the treaty has no counterpart in the municipal law of England and hence "there would appear to be no legal procedure for resisting the exercise of jurisdiction by an Allied service court over these crimes." 1950 *Brit. Yb. Int'l. Law* 186, 198; and 1949 *Brit. Yb. Int'l. Law* 380, 405.

⁴⁶ Section 12 of the Defence (Visiting Forces) Act, 1939 (Aus.) and Section 9 of the Visiting Forces Act, 1939 (N.Z.).

⁴⁷ 364 H.C. Deb. (5th ser.) 1403 (1940).

⁴⁸ 364 H.C. Deb. (5th ser.) 1404-06 (1940).

⁴⁹ 5 & 6 Geo. 6, c. 31. The Exchange of Notes is appended as a Schedule to the Act.

international law in granting immunity from the exercise of jurisdiction by the British Court.⁵⁰ The Note stated the British Government "was prepared * * * to give effect to the desire of the Government of the United States" that its service courts and authorities have exclusive jurisdiction. It went on to state that: "In view of the very considerable departure which the above arrangement will involve from the traditional system and practice of the United Kingdom there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government."⁵¹

⁵⁰ The Lord Chancellor in moving the second reading of the Bill in the Lords stated that: "Apart from this legislation there can be no doubt that in any such case [of an offense against the criminal law] there would be jurisdiction in the British Courts." He also remarked that "I think your Lordships will see that this is a very interesting and, I admit, a most unusual proposal: One which would never be justified or tolerated except under conditions of war and except under conditions of the closest feeling of comradeship and of common legal traditions. * * *" 124 H.L. Deb. (5th ser.) 61, 66 (1942).

"It is a proposal unique in the constitutional history of this country, but the Government of the United States have been so ungrudging in the aid given to this country that if they express a desire for such legislation no one would hesitate to grant it." Lord Atkin in *The Times*, Aug. 3, 1942.

"In World War II, in England, we had complete extraterritoriality granted by the British Parliament under a very strong urge by the Prime Minister, under conditions where Britain, fighting for its life, wanted all the troops she could get on the British Isles, and would make almost any sacrifice to get them." Gen. Walter Bedell Smith, Under Secretary of State, *supra*, note 8, at 23.

⁵¹ (Emphasis added). The points were (1) that the American authorities would assume responsibility for trying and on conviction punishing those who were alleged on sufficient evidence to have committed criminal offenses in the United Kingdom; (2) that a trial for an offense against a civilian would be in open court (subject to security considerations) and would be held promptly in the United Kingdom and "within a reasonable distance from the spot where the offense was alleged to have been committed" for the convenience of witnesses; (3) that no one should be tried for a pre-Pearl Harbor offense; (4) that "satisfactory machinery" would be devised for mutual assistance in criminal investigations; (5) that the arrangement should operate during the war and for six months thereafter and (6) the agreement was "subject to the necessary Parliamentary authority." Quite apart from the overtone of such phrases as "the very considerable departure * * * from the traditional system and practice," the conditions imposed with respect to the time, place and the manner of conducting trials and the statement that Parliamentary authority was necessary, implied that in the British Government's eyes the grant of immunity was not required by international law.

The Bill was first introduced in the House of Lords—the practice with non-controversial Bills—and the House of Commons was asked to pass it in a single day. Some Members nevertheless found opportunity to voice their misgivings, most interestingly in terms of the inconsistency between granting the immunity and the traditional subordination of the military to the civil authorities in the United Kingdom.

The Note of the Foreign Minister, although it expressly disclaimed any wish to make the grant of immunity from British jurisdiction “dependent upon a formal grant of reciprocity” expressed the hope that if British forces were stationed in American territory, the United States would be “ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of the American forces in the United Kingdom. * * *” Almost two years later, on June 30, 1944, the Service Courts of Friendly Foreign Forces Act was passed.⁵²

The guarded opinion had been expressed that both the Federal and State courts of the United States would recognize the immunity of British forces in the United States from the jurisdiction of the local criminal courts.⁵³ The Senate Committee on the Judiciary and individual Senators in debate on the floor, dis-

⁵² Chap. 326, 58 Stat. 643, 22 U.S.C., 701–06.

⁵³ “Unless the [Federal] court should disregard those opinions [in *The Schooner Exchange*, *Coleman v. Tennessee* and *Dow v. Johnson*], it would be obliged to hold without regard to the exchange of notes, that British military personnel forming part of an organized force entering the United States with the consent of our Government are exempt from the jurisdiction of the courts of the United States.

“A case arising in a State court ought to be decided the same way and probably would be if the above decisions were brought to the attention of the Court. It is, however, possible that one or more judges of inferior courts * * * unskilled in matters of international law might * * * assert their jurisdiction * * * and might even convict and sentence * * *. If the Department of State should make public announcement that, in its view the personnel of British armed forces * * * are subject to the jurisdiction of their own courts-martials only and exempt from that of the courts of the United States and the several States; and the Department of Justice should * * * direct the appropriate United States attorney to file a suggestion * * * that the case * * * is within the exclusive competence of a British court-martial, the likelihood of such a conviction would be still further diminished even if such a conviction should take place. * * * It should be reversed and the sentence set aside by the proper appellate court upon such a suggestion * * * and upon the three cases above mentioned being cited.” King, *op. cit. supra*, note 9, at 566.

tinguishing nicely between the several issues raised, indicated that (1) they believed the British authorities were entitled under international law to exercise jurisdiction over their forces in the United States, without implementing American legislation,⁵⁴ (2)

⁵⁴ Senator Revercomb offered an amendment (90 Cong. Rec. 6496 (1944)) reading: "The Service Court of any friendly foreign force * * * is hereby authorized to exercise its jurisdiction within the territorial limits of the United States during the continuance of the present hostilities, and six months thereafter." The debate in the Senate centered around this proposed amendment.

It is not easy to follow Senator Revercomb's argument. He apparently felt that, if the British forces in the United States had constituted an army—an organized body of troops—they would have been immune from American jurisdiction, at least if they had been in passage, and that the amendment authorizing the exercise of jurisdiction would then have been unnecessary. Since neither condition existed, the amendment was necessary or, in any event, desirable, to avoid uncertainty. (*Id.*, at 6497). Senator Revercomb's argument based on the obligation to pass legislation reciprocal to that passed by Great Britain was weakened because he could point to no comparable provision in The United States of America (Visiting Forces) Act, 1942. He apparently was not informed that the status of the American forces in the United Kingdom was governed directly not only by that Act but by The Allied Forces Act, 1940, which contained a provision analogous to the amendment he proposed and, indirectly, by The Visiting Forces (British Commonwealth) Act.

Senators Murdock and Connally were clear that the British service courts could exercise jurisdiction in the United States without authorization by the Congress and that all that was needed was, in Senator Murdock's words, "to implement whatever jurisdiction the service courts bring with them." (*Id.*, at 6497).

Senator Connally argued:

"Mr. President, is not the whole question one of permission to the foreign force to be here? We can exclude them if we desire to do so, but does not our consent to their being here carry with it * * * that the force may exercise its discipline and its control, and punish infractions on the part of its members? That being the case, why is it necessary for us specifically to provide that they can exercise their jurisdiction here? * * * If we permit foreign troops and foreign naval officers and naval organizations to be within the United States, the implication and the natural inference is that they can exercise their normal functions. The purpose of the Bill is simply to cooperate with those functions by permitting, with our consent, of course, the summoning of civilian witnesses to attend the session of their service court. As I understand it, that has to be done by permission." (*Id.*, at 6497).

The position taken by Senators Murdock and Connally apparently had the support of the State Department, since in a letter to the Judiciary Committee Secretary Hull stated he had advised the British Ambassador that: "* * * the interested agencies of this Government were of the opinion that

implementing legislation was necessary to enable American officials to arrest and turn over to the British military authorities members of the British forces, to provide for summoning witnesses not members of those forces and for punishing such witnesses for perjury or contempt, for immunity for the members of British service courts and witnesses before them, and for imprisonment of convicted offenders in American penal institutions; (3) but they did not believe foreign armed forces were entitled to immunity from the jurisdiction of American courts under international law, doubted that Congress could constitutionally grant such immunity from the jurisdiction of State courts, and were clear that in any event it did not wish to grant such immunity.⁵⁵ The statute accordingly dealt only with the second

British service courts and authorities in the United States have the right under our law to exercise jurisdiction over members of their forces. With respect to the facilities requested to make such jurisdiction effective, it was stated that in the opinion of the interested agencies of the Government additional legislation would be necessary to make some of such facilities available * * *." Report of the Senate Judiciary Committee, 78th Cong., 2d Sess., 2-3 (June 8, 1944).

⁵⁵ Senator Murdock: "I ask the Senator whether he wants to prohibit the jurisdiction of the Federal courts and the jurisdiction of the State courts, as a parliamentary act prohibits the jurisdiction of the criminal courts in England. If he wants to go that far, I think he should tell the Senate. That is one of the questions * * * which came before the Committee * * *. By a majority vote it was decided, I think rather emphatically, that we did not want to prohibit jurisdiction on the part of our courts, but that all we wanted to do was to implement whatever jurisdiction the foreign service courts brought with them to this country, first, by power of arrest, second, by power of dealing with witnesses, and stop there."

* * * * *

"By this bill we deny no jurisdiction at all to either the Federal or the State courts of this country, * * *. As I understand the Senator from West Virginia, he wants to deny criminal jurisdiction to the Federal and State courts of this country. The position I take is that it is not necessary to go that far, nor did I want to go that far, nor do I think Congress has the right to prohibit jurisdiction on the part of the State courts over criminal matters." 90 Cong. Rec. 6491, 6492, (1944).

It is difficult to understand the basis for the statement that "Public Law 384, 78th Congress (Chapter 326, 2nd Session) * * * assumes the existence of this exclusive jurisdiction under international law and implements it. That this is the legislative intent is clear from the debate in the Senate. * * *" Bathurst, "Jurisdiction over Friendly Foreign Armed Forces: The American Law," 1946 Brit. Yb. Int'l. L. 338, 341. See the discussion of this statement in Parliament during the debate on the Visiting Forces (Ap-

category of problems and its operation was made dependent upon a Presidential Declaration which could be revoked.⁵⁶

The Senate did believe, however, that the Congress could impose conditions on the exercise of jurisdiction by a foreign service court. The Report of the Senate Committee on the Judiciary expressly stated that "[T]he Committee do not concede that any foreign military court has more than conditional jurisdiction while on our soil" and the Senate adopted an amendment offered from the floor relating to the time, place and manner of trial where the offense was against a civilian.⁵⁷ Apparently, however, it was thought unnecessary to protect the foreign service court against the supervisory jurisdiction of American courts. There is no provision in the Act comparable to that in the British statute.

The United States had in the meantime been granted exclusive jurisdiction over its armed forces by a number of other countries.⁵⁸ The record, however, plainly negatives any inference that

plication of Law) Order, 1954, 526 H.C. Deb. (5th ser.) 1280, (1954), quoting a letter from Dr. Barton vigorously criticizing the statement.

See also the comment later made by General Walter Bedell Smith, Under Secretary of State, in a letter to Senator Wiley, 99 Cong. Rec. 8776 (1953):

"It is the opinion of the Departments of State and Defense, that it is neither necessary nor desirable for the United States to seek or have exclusive jurisdiction by treaty over its forces, civilian components, or their dependents in the NATO countries, *nor to grant exclusive jurisdiction over similar foreign persons with respect to offenses committed within the territory of the United States.*" (Emphasis added.)

⁵⁶ Service Courts of Friendly Foreign Forces Act, 22 U.S.C. 702. The required proclamation was made as to British and Canadian forces by Proc. No. 2626, 9 Fed. Reg. 12403 (1944) and revoked by Proc. No. 3107, 20 Fed. Reg. 5805 (1955).

⁵⁷ 78th Cong., 2d Sess., June 8, 1944. The amendment repeated almost verbatim the statement in the Note of the British Foreign Minister. The Bill had previously been amended in Committee to require that trial take place in the United States. The Committee Report stated that "It is the view of the committee that a law-breaking foreigner who has become subject to civil arrest for violation of our law should not be removed to his homeland or put out of our national jurisdiction for trial." (at 1)

The Restatement, *Foreign Relations Law*, Comment b to Section 58, p. 186, recognizes the right of a state to impose such conditions.

⁵⁸ The U.S. Memorandum lists the following, *op. cit. supra*, note 2, at 415: "Australia—Exclusive jurisdiction unilaterally without any agreement.

Statutory rules 1942, No. 241—dated May 27, 1942. Notified in the Commonwealth Gazette on May 27, 1942.

these grants were made in recognition of any obligation under international law.

Perhaps the most interesting review of the whole question was that of the Supreme Court of Canada in *Reference Re Exemption of U.S. Forces from Canadian Criminal Law*.⁵⁹ The status of the United States forces in Canada then closely paralleled that of our forces in the United Kingdom prior to the passage of the United States of America (Visiting Forces) Act, 1942.⁶⁰ An Order in

China—Agreement similar to that with United Kingdom concluded by exchange of notes, on May 21, 1943.

Egypt—Agreement similar to United Kingdom agreement concluded by exchange of notes. *Journal Officiel*, Cairo, March 2, 1943.

India—Agreement similar to United Kingdom agreement concluded by exchange of notes. Implemented by Ordinance No. LVII of 1942, Allied Forces (United States of America), Ordinance, 1942. *Gazette of India Extraordinary*, October 26, 1942.

Iraq—Exclusive jurisdiction recognized unilaterally by Law No. 24 for 1943—Law for the Extension of the Immunities and Privileges Mentioned in the Treaty of Alliance concluded between Iraq and Great Britain to the Forces of the United Nations. Made at Baghdad, March 7, 1943. Made applicable to American forces in Iraq by regulation No. 2084, published in *Gazette* on March 15, 1943.

Liberia—Exclusive jurisdiction given by Article 2 of the Agreement of March 31, 1942, between the United States and Liberia. *Department of State Bulletin*, December 5, 1942.

New Zealand—Agreement similar to United Kingdom agreement effected by exchange of notes. Implemented by Order in Council Serial No. 1943/56, the United States Forces Emergency Regulations 1943. Dated April 7, 1943. Notified in the *Gazette*: April 8, 1943."

To these should be added Greenland, by treaty with Denmark, April 9, 1941, EAS (1941) No. 204, and Iceland, by an agreement of July 1, 1941, [1948] 12 U.N.T.S. 405.

⁵⁹ [1943] 4 D.L.R. 11.

⁶⁰ The status of foreign troops in Canada was governed by the Visiting Forces (British Commonwealth) Act, 1932–1933 (Can.) c. 21 and the Foreign Forces Order, 1941 (P.C. 2546, 74 Can. Gaz. 4416), the latter comparable to the Armed Forces Act, 1940 of the United Kingdom. The Foreign Forces Order, 1941 was made applicable to United States forces by an Order of July 27, 1942 (P.C. 6566, 76 Can. Gaz., 717), which was superseded by an Order of April 16, 1943 (P.C. 2813, vol. III (1943) C.W.O. & R., 30) making the Foreign Forces Order, 1941 applicable to United States forces except for its proviso denying jurisdiction to a foreign service court in cases of murder, manslaughter and rape, etc.

Council had, however, included a clause saving the claim of the United States that its forces were immune from Canadian jurisdiction.⁶¹ The Governor General referred the question to the Supreme Court. The Canadian Attorney General submitted a *Factum* and the United States a Memorandum, both in favor of the claimed immunity. The attorneys general of five Canadian provinces took the contrary position. Two judges held there was no immunity, one that there was a qualified immunity, and two that there was a general immunity. Their disagreement was in large part with regard to the relative weight to be attached to the practice of states as compared to the opinions of the text writers.

The Chief Justice, in an opinion in which Judge Hudson joined, although he referred to *The Schooner Exchange*,⁶² limited his comment to a discussion of the British constitutional principle that the military are not immune from the jurisdiction of the civil courts, and to a review of the British practice and attitudes beginning with the Visiting Forces (British Commonwealth) Act, 1937, with only passing reference to the World War I Anglo-French agreement and Anglo-American negotiations. His conclusion was (p. 21) that "[N]o such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada."

Judge Kerwin, in reaching the opposite conclusion, relied on the World War I arrangements,⁶³ the United States of America (Visiting Forces) Act, 1942 and the Exchange of Notes which

⁶¹ "2. The application of the Foreign Forces Order, 1941, as aforesaid, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian Courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America founded on the consent granted by His Majesty's Government in Canada to such forces to be present in Canada." Order of April 16, 1943. C.P.C. 2813, Vol. III (1943) C.W.O. & R., 30.

⁶² 11 U.S. (7 Cranch 116) (1812).

⁶³ Judge Kerwin said of the World War I Anglo-American negotiations that "In this exchange of notes the United States throughout took the position that members of her forces in Britain were exempt from prosecution in the British courts." [1943] 4 D.L.R. 11, 30. But see pp. —, *supra*.

preceded it,⁶⁴ and the opinions in *The Schooner Exchange* and *Chung Chi Chung v. The King*.⁶⁵

Judge Taschereau, agreeing with Judge Kerwin, relied primarily on the opinions of text writers. *The Schooner Exchange* and *Chung Chi Chung v. The King*.⁶⁶ He referred only briefly to the World War I experience and dismissed the later practice with a sentence.⁶⁷

Judge Rand's approach was that the rules of international law on jurisdiction and immunities "lie in practice and principles, and each depends on its special circumstances." His conclusion was that visiting forces are immune only with respect to offenses "committed in their camps and on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their Government, but the exemption is only to the extent that United States courts exercise jurisdiction over such offences." (p. 51)

All the judges were agreed, however, that the Government could accord immunity to the American troops, and it later did so.

Shortly after the decision of the Canadian Court, the Supreme Court of New South Wales had occasion to review the same question, and in *Wright v. Cantrell* expressed the conclusion that visiting forces enjoyed no general immunity from the local criminal jurisdiction under international law, although United

⁶⁴ *Supra*, p. 129. Judge Kerwin quoted (p. 32) from the Foreign Minister's note: "In view of the very considerable departure which the above arrangements would involve from the traditional system and practice of the United Kingdom * * *," and observed: "I take it that refers to a departure in the sense that foreign troops had not been on the soil of Great Britain for many years with the exception of the last great war." This is, it is respectfully submitted, a clear misreading of the Foreign Minister's meaning.

⁶⁵ [1939] A.C. 160.

⁶⁶ "From this judgment * * * it flows clearly to my mind that some immunities exist in favour of foreign troops. * * * [T]he essence of the decision does not apply only to ships in territorial waters, but applies equally to all armed forces." *Supra*, note 63, at 35.

⁶⁷ "I have read with care various agreements which have been entered into during the last war * * *. All these agreements tend to show the existence of this universally adopted rule of international law. * * *" *Id.*, at 41.

"* * * I would like to point out that the United States of America (Visiting Forces) Act, 1942, enacted by the United Kingdom, differs from what I think are the settled and accepted principles of international law in relation to immunities." *Id.*, at 43.

States forces had been accorded such immunity by statutory rule.⁶⁸ The Mixed Court of Cassation of Egypt, in an opinion distinguished for its extensive review of the available precedents, had reached the same conclusion, although it recognized a limited immunity for offences within camps and on duty.⁶⁹ No court of comparable status reached the contrary result.⁷⁰

The foregoing review makes it abundantly clear that no rule of international law was ever established according visiting armed

⁶⁸ [1943-1945] Ann. Dig. 133 (No. 37); [1943] V.L.R. 185; [1943] A.L.R. 427. The action was for defamation against a British subject, serving in the naval forces of His Majesty. The defendant pleaded that the acts complained of were done while he was working for and under the orders of the United States armed forces. Jordan, C.J., in an extended opinion, considered immunity both from civil and criminal jurisdiction. Referring to the British Act and the Australian Regulations according exclusive jurisdiction to the United States with respect to criminal offences, he said, at 139-41:

"It is evident that these provisions do not involve the recognition by Great Britain and the Dominions of any such rule of complete immunity as has been here contended for, and do not constitute a regulation of the incidents of such an immunity conceded to be otherwise existing. They are expressly stated to be a departure from traditional system and practice. * * *

"It is clear from the foregoing that the doctrine of complete immunity which has been contended for on behalf of the defendant is not only completely lacking in what has been described [as] 'the hallmarks of general assent and reciprocity', but is also inconsistent with the implication of local legislation.

* * * * *

"It [international law] must also be deemed to concede to those in command of the force all authority necessary to maintain discipline over its members, and to agree to refrain from itself interfering in purely disciplinary matters, and, in some cases at any rate, in matters which are not merely disciplinary, but constitute criminal offences committed by one member of the force against another. This appears to be recognized by the decision of the Privy Council in the case of *Chung Chi Cheung v. R.*, [1939] A.C. 160 * * *. It is obvious that discipline could not be maintained if, when a member of the force had been confined to barracks, a local court would entertain an action by him against his superior officer for false imprisonment. * * *"

The comments of the Chief Justice regarding criminal jurisdiction are, of course, dicta.

⁶⁹ *Manuel v. Ministère Public*, [1943-1945] Ann. Dig., 154 (No. 42). The status of British troops in Egypt was fixed by the Anglo-Egyptian Treaty of August 26, 1936, granting immunity.

⁷⁰ But see *In re A.F., Tribunal Correctionnel of the Isle of Chios, Greece*, [1943-1945] Ann. Dig., 163 (No. 43). The British forces in Chios at the time may have had the status of a liberating, occupying force.

forces a general immunity from the jurisdiction of the receiving state. The situation is less clear with respect to a limited immunity, with respect to acts taking place in the camps occupied by the visiting forces. Many states were not prepared to concede even this limited immunity.

There was never, of course, any doubt that the sending state had legislative jurisdiction over its armed forces abroad. Some doubt exists, however, that its unqualified right to exercise enforcement jurisdiction was established as a rule of international law. Receiving states felt entitled, at least, to regulate and place conditions upon such exercise of enforcement jurisdiction. It is, on the other hand, abundantly clear that no sending state was ever considered as entitled to exercise any jurisdiction over any person not a member of, or associated with, its armed forces, except in a combat zone.

The frequent instances in which the allocation of jurisdiction was determined by international agreement and implementing municipal legislation not only indicates that states did not feel compelled to accord a general immunity to visiting armed forces but also suggests that the situation is inherently so complex and the conflicting interests so evident that international agreements and implementing legislation are necessary to a satisfactory arrangement.

CHAPTER VII

THE TREATY ERA¹

The United States had exclusive jurisdiction over its forces in most, though not all,² foreign countries in World War II. Our allies did not, however, always grant the same immunity to other friendly forces stationed in their territories,³ nor did the United States to the forces of its allies stationed in the United States.⁴ Decisions of the Supreme Court of Canada, the Supreme Court of New South Wales and the Mixed Court of Cassation of Egypt⁵ supported the view that the grant of exclusive jurisdiction to the United States over its forces by its allies was not compelled by any rule of international law but was in the nature of a concession. Many of our allies emphasized that the grant of exclusive jurisdiction was prompted by the circumstance of war and would

¹ There are, in addition to the agreements which will be discussed below, classified agreements with certain countries. No reference will be made even to their existence, except where this has been made public, and the situation will be described as though the agreements did not exist, although this necessarily involves giving a distorted picture.

The significant agreements to which the United States is a party are given in abridged form in the Appendix. Where no citation is given for an agreement, it may be assumed it can be found in the Appendix. There are no status of forces agreements with certain countries, e.g., Panama, Iran, Hong Kong, Gibraltar.

² The United States did not have exclusive jurisdiction under the Leased Bases agreement.

³ The status of the forces of the United Kingdom's allies, other than the United States and the Commonwealth countries, continued to be governed throughout World War II by the Allied Forces Act, 1940. See p. 127, *supra*.

⁴ P. 131, *supra*.

⁵ Pages 135-138, *supra*. Several judges of the High Court of Australia took occasion, in their opinions in *Chow Hung Ching v. The King*, 77 Commw. L.R. 449 (Aust. 1948), to indicate their view that visiting foreign forces did not enjoy a general immunity; their views differed as to the scope of any limited immunity which might exist. The decision denying immunity to the defendants was, however, based on the conclusion that they were not in any event members of a military force.

terminate with the end of hostilities. Their attitudes and actions in the immediate post-war period showed that they considered the distinction between war and peace significant, and were not prepared to grant immunity to visiting forces in peacetime. Canada in 1947 passed the Visiting Forces (United States of America) Act⁶ under which visiting foreign forces, including those of the United States, did not enjoy immunity from local criminal jurisdiction.⁷ The United Kingdom, although it did not repeal the United States of America (Visiting Forces) Act, 1942, until it implemented the NATO Agreement in 1952, repeatedly raised the issue of termination of the Act.⁸ In the meantime, in

⁶ 11 Geo. v [1], c. 47 (Can.).

⁷ Section 4(1) provided that: "Nothing in section three of this Act [authorizing United States military authorities to exercise jurisdiction over U.S. troops in Canada] shall affect the jurisdiction of any civil court in Canada to try a member of a United States force for any act or omission constituting an offence against any law in force in Canada whether or not proceedings with respect to such act or omission have been instituted by a United States service authority or before a United States service court." Certain sections of the Criminal Code were, by Section 9(1), made inapplicable to a member of the United States force acting in the course of his duty.

Mr. Claxton, Minister of National Defence, in introducing the bill to implement the NATO agreement, said that "[W]ithout such legislation in effect in this and other countries the forces of Canada and the other North Atlantic treaty nations when in another country would have no more rights or immunities than tourists. In respect of the laws of the country they were visiting they would be in the same position as one traveling on civilian business." H.C. Deb. (Canada), 2nd Session, 1951, Vol. 1, 1061.

⁸ " * * * [T]he British indicated they would terminate it when the hostilities were over and they sent official notes to us at least twice [April 30, 1948 and June 6, 1950], and several informal communications, that they wanted to terminate this wartime situation.

"They indicated to us that they wanted to terminate this jurisdiction which they had given to us entirely as a wartime measure. As a matter of fact, they did it with great reluctance and only under conditions in which they were in no position to refuse." Mr. Yingling, Department of State, Hearings on H.R. 309, Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. 347 (1955).

The Home Secretary stated in the Commons that " * * * [A]s various hon. members have pointed out, the arrangements made in 1942 whereby exceptional privileges of exclusive jurisdiction were conferred on the United States, while they might be appropriate in wartime and the aftermath of war, are not appropriate for peace-time; and it would be better to substitute our proposals of concurrent jurisdiction." 505 H.C. Deb. (5th ser.) 1588 (1952). See also the comment of Mr. Silverman, *id.*, at 1069.

1948, it entered into an agreement with France which gave British forces in France immunity from French jurisdiction only for *inter se* offenses.⁹ Some of the Western European countries took an even firmer position with respect to the liability of our forces to local criminal jurisdiction and in a few instances American troops were in fact tried in the local courts.¹⁰ The Brussels

Surprisingly, the Lord Chancellor, Lord Simonds, in moving the second reading of the Bill implementing the NATO Agreement in the Lords, quoted Oppenheim's views on the status of forces (*infra*, p. 197) and at least suggested they reflected "the true position." 177 H.L. Deb. (5th ser.) 453 (1952).

⁹ U.K.T.S., 1948, No. 44.

"Article 4(1). The United Kingdom military authorities will exercise their exclusive jurisdiction in the case of an offence committed by a member of the United Kingdom Armed Forces in the following circumstances:

- (a) When the victim of the offence is a member of the United Kingdom Armed Forces; or
- (b) When the offence is contrary to United Kingdom military law but not to French law.

In all other cases the French authorities will examine with the greatest consideration any request which may be received from the United Kingdom authorities, before a French Court has passed sentence, for the transfer of the accused before a United Kingdom Military Court."

¹⁰ Many of the post-war agreements have not been published. The situation which prevailed before the NATO Agreement was ratified was summarized in a letter of Acting Secretary of State Smith to Senator Wiley of April 22, 1953, Senate Foreign Relations Committee, "NATO Treaties," S. Exec. Rep. No. 1, 83rd Cong., 1st Sess. (1953).

"My dear Senator Wiley: I understand that the question has been raised as to the relation of the NATO status treaties with present arrangements which we now have governing the criminal jurisdiction of our forces abroad.

I think that the following points are controlling:

1. As appears on page 28 of the record of the hearings before the Committee on Foreign Relations on April 7 and 8, 'With respect to criminal jurisdiction, we will have generally better rights under these treaties than under the interim arrangements. The sole exception is the situation in the United Kingdom' where the NATO formula will shortly become applicable in any event. For example, in one case, we have an interim arrangement where some of our personnel can be tried by our authorities, while the remainder are entirely subject to local law. This arrangement is an informal one and lacks legal standing.

In another case we do not even have exclusive jurisdiction of our personnel for offenses committed in performance of official duty.

In a third case it is agreed that we will have exclusive jurisdiction until the NATO status-of-forces treaty becomes effective; should it not

become effective, we anticipate that this agreement would have to be renegotiated.

In still another case we now have no jurisdiction over offenses of our personnel against local law.

Other arrangements incorporate the terms of the NATO status-of-forces agreement. In some cases we have no arrangements whatsoever.

All of the foregoing arrangements are informal *ad hoc* interim arrangements providing a confusing and varying pattern of rights and responsibilities. The arrangements have perforce been limited by the existing legislation in each country, which in most cases is not as favorable as that of the NATO status-of-forces formula. The present arrangement therefore lacks operational uniformity as well as legal sanction, and does not provide adequate protection of our forces abroad.

2. Under the present interim arrangements, we have been working out our problems solely by reason of the cooperative spirit of the other countries and their authorities. It is not easy for the authorities of these other governments to cooperate with us in every case, as their present legal structure in most cases does not provide for as favorable treatment as that established by the treaties. The treaties would clarify, codify, and authorize on a firm legal basis the treatment which has been extended to us solely as a matter of grace and good will."

A letter from Secretary of Defense Wilson to Chairman Gordon of the House Committee on Foreign Affairs, of July 1, 1957, Hearings on H.R. 8704, Before House Committee on Foreign Affairs, 85th Cong., 1st Sess. 3447 (1957), reads in part:

"Prior to the ratification by the Italian Government of the NATO Status of Forces Agreement, we had no status agreement with Italy. During this period, the Italian Government felt obliged to take the position under its constitution that our troops were entitled to no immunity from the jurisdiction of their courts. It also felt obliged under Italian law to maintain that United States courts-martial could not constitutionally operate on Italian soil. We do not believe that the Italian view on either of these points can be written off as one of their national idiosyncrasies."

See also the statement of General Hickman, Hearings Before a Subcommittee of the Senate Armed Services Committee, 84th Cong., 1st Sess. 35 (March 29, 31 and June 21, 1955), that in Italy prior to its ratification of the NATO Agreement, jurisdiction was "governed by the Italian legal system which precludes foreign courts from exercising jurisdiction within Italian territory."

The French attitude is indicated by the statement of Deputy Under Secretary of State Murphy that "in the debates in the French Parliament, a good many members of the French Parliament would insist that they would rather not have American troops there if they had to concede on the question of jurisdiction." Hearings, H.J. Res. 309, *supra*, note 8, at 346.

In *Nusselein v. Belgian State*, Court of Cassation, 2d Chamber, Feb. 27,

Treaty Powers made their position clear by entering into a status of forces arrangement which provided that “‘Members of a foreign force’ who commit an offence in the ‘receiving State’ against the laws in force in that State can be prosecuted in the courts of the ‘receiving State.’”¹¹ Even defeated Japan, where the United States as an occupying power at first exercised exclusive jurisdiction over its forces, insisted that the status of the United States forces in Japan should be the same as in the NATO countries when the NATO Agreement was ratified.¹²

1950, [1950] Int’l L. Rep. 136 (No. 35), it was held that a Belgian court had jurisdiction over a Netherlands soldier for crimes committed against the safety of the state in Belgium or abroad.

¹¹ Agreement of December 21, 1949, 22 *Dept. State Bull.* 449, (March 20, 1950) Cmd. 7868. There was no exception to the recognition of the jurisdiction of the receiving state, although it was enjoined to waive its jurisdiction in certain instances.

A statement of the State Department submitted in the Hearings, H.J. Res. 309, *supra*, note 8, at 290, read in part:

“[T]he Brussels Pact countries had already dealt with this question in regard to their forces in the territories of each other before the NATO Status of Forces negotiations began. This agreement * * * recognized the full jurisdiction of the host state even as to duty offenses, providing only for sympathetic consideration of requests for waiver. These countries constituted the bulk of the NATO countries and these had already shown their willingness to send forces although they would be subject to the laws of their allies, and their unwillingness to grant immunity from their own laws to the forces of their allies.”

¹² The Administrative Agreement with Japan under Article III of the Security Treaty, February 28, 1952, 3 UST 3341, TIAS 2492, provided:

“ARTICLE XVII

1. Upon the coming into force with respect to the United States of the ‘Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces’, signed at London on June 19, 1951, the United States will immediately conclude with Japan, at the option of Japan, an agreement on criminal jurisdiction similar to the corresponding provisions of that Agreement.”

During the Hearings on H.J. Res 309, *supra*, note 8, at 324, Congressman LeCompte read into the record an editorial from the Des Moines Register which said:

“During the World War II emergency, several countries gave the United States temporarily, the right to try United States soldiers charged with civilian crimes abroad, but this couldn’t last. Higher pay and higher living standards are irritating enough without extraterritorial rights in criminal law.

“Western countries used to insist on such rights in Eastern lands and this was a terrific grievance to Japanese, Turkish, and Chinese national

Several reasons are discernible as to why states which had been willing to grant immunity to visiting forces in war-time were unwilling to do so in time of peace. A grant for the duration of

pride until the 'capitulations' and the 'unequal treaties' were at last canceled many years ago. The United States can hardly expect that kind of special rights on a permanent basis anywhere today."

Deputy Under Secretary of State Murphy commented (*Id.*, at 325):

"What is said in that editorial about capitulations, of course, provides the backdrop for the emotional situation that you have in the Japanese Parliament, on this very subject, because they did submit to a capitulatory system for a number of years and now their self-assertion is very great and any concession of jurisdiction on their part is quite an enormous thing. That is why we are gratified that the NATO Status of Forces formula is applicable to Japan."

Again Mr. Murphy said (*Id.*, at 288):

"I was acquainted with a great many members of their Diet who want our forces there, sincerely want our forces there, and who I think appreciate the value to Japan of their presence.

"At the same time, on an emotional issue like this court jurisdictional question—and I discussed it with many of them—you have to think of the history connected with it, the distinction that is made between the races, the fact that capitulations existed in that area. You have a whole emotional historical background for this purpose.

"I am convinced if we today, regardless of the major elements that you talk about, and where the line of defense is and where the major interests of the country should lie, that on an emotional question like this one in the Japanese Diet tomorrow we would get less than we have today. That is my honest conviction, just based on the observation that I made while I was there.

"I want to make that distinction between the factors that you mention of the larger strategic concepts, the appreciation of the population, where their major interests lie, and this issue."

In the Hearing on H.R. 8704 of July 24, 1957, *supra*, note 10, at 3460–61, Mr. Murphy said of the negotiation with Japan:

"We were faced with the grim determination on the part of the Japanese legislative body * * * the impact of their opinion on the Government was very clear and very determined. Because they insisted that as soon as the NATO status-of-forces formula was accepted by the other nations, they could not accept anything less. * * * There was a great sensitivity about equality and sovereignty, which was a growing body of public opinion, which was reflected in their Diet."

Japan had asserted jurisdiction over British sailors from the warship *Belfast* for an offence committed on shore (robbing of a taxi driver) in June 1952, although the warship had been engaged in action in Korean waters until just before her visit to Kobe. *Japan v. Smith and Stinner*, High Court of Osaka (Sixth Criminal Division), Nov. 5, 1952, [1952] Int'l L. Rep. 221, (No. 47).

the war was thought of in terms of a short period. The present uneasy peace is thought of as likely to last for an indefinite period.¹³ The need for the presence of foreign troops is as real; however, it may not be so obvious and urgent to the general public. Military exigency may require that a commander retain as complete control over his troops in peace as in war, but the argument is seemingly less compelling. Since war could break out at any moment, it is possible that the exercise of jurisdiction over visiting troops by the receiving state could interfere with military operations as much as in war-time.

Troops in time of war are exposed repeatedly to danger and hardship. No one is likely to think of them then as a privileged class. In time of peace, danger and hardship lie largely in the uncertain future—troops have more leisure, travel facilities are more readily available, and they are more likely to mingle with the local population. Perhaps for these reasons the people of a receiving state are psychologically less prepared to accept what they view as an infringement of their state's sovereignty, through granting immunity to foreign troops, as they are less prepared to accept a curtailment of their own rights and privileges.¹⁴ A comparable shift in the attitude toward the appropriate prerogatives and perquisites of a state's own armed forces has occurred often enough. The rise of nationalism since World War II has accented these tendencies in some areas, and in certain instances unhappy memories of extraterritoriality have made their contribution. Even in the United Kingdom, sensitivity regarding the proper recognition of its sovereign equality has been a larger factor than might have been anticipated.¹⁵

¹³ "[T]his is the first time that we have ever really envisaged a state of affairs in which visiting forces in large numbers would spend an indefinite period on British soil in what is technically a time of peace. * * * That makes a great deal of difference." Viscount Bridgeman, 177 H.L. Deb. (5th ser.) 471, (1952).

¹⁴ "Recently nations have found it necessary to their security to permit foreign armies to remain in their territory for indefinite periods. Under these circumstances the receiving state is naturally concerned with the protection of its citizens and, except in unusual circumstances, will be reluctant to waive, expressly or impliedly, the right to assert jurisdiction over offenses against local law in matters affecting them." Draft Restatement, *Foreign Relations*, Sec. 44, Comment a at 137 (Tent. Draft No. 2, 1958).

¹⁵ Perhaps half the debate in Parliament on the Bill implementing the

After World War II, the United States withdrew from its position that its troops abroad were in all circumstances entitled to immunity under international law,¹⁶ and turned to the negotiation of status of forces treaties.¹⁷ What may be called the treaty

NATO Agreement related to ensuring that the United States granted reciprocal treatment to British forces stationed in the United States. All concerned agreed that reciprocity was essential although all understood that no significant number of British troops were likely to be stationed in the United States.

¹⁶ The Restatement, *Foreign Relations Law*, Section 60, p. 189, states: "Except as provided in Secs. 61 and 62, a state's consenting to the presence of a foreign force within its territory does not of itself imply that the state waives its right to exercise enforcement jurisdiction over members of the force for violations of the criminal law of the territorial state."

Comment a to Section 60 states in part that "The concern of the territorial state with the protection of persons and property normally precludes the implication of such a waiver. Exceptions to the rule stated in this Section arise only when the exercise of local jurisdiction would be inconsistent with the reason for granting entry to the force or would prevent effective prosecution of its mission."

The Reporters' Note to Section 60, p. 191, distinguishes *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812) as concerning troops in passage, and cites the opinion of the Supreme Court in *Wilson v. Girard*, 354 U.S. 524 (1956) as well as the British attitude in World War II.

¹⁷ It nevertheless gave ground only grudgingly. In the NATO negotiations the United States Representative noted that the Article on criminal jurisdiction "was based on the principle that the jurisdiction of the receiving State applied to 'foreign forces and civilian personnel, hereafter described by the term 'contingents.' This principle, on which the United States Draft was based, differed from International Law which provided that, in the absence of any special agreement, the sending State retained the right of jurisdiction over its forces stationed outside the national territory. The International Law on the subject was largely inspired by the decision of Chief Justice Marshall in the case of *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812)." MS-R (51) 4. A discussion in the Juridical Subcommittee indicates the Netherlands representative agreed with this view, but the Belgian and Italian representatives did not. MS-(J)-R (51) 2.

The NATO Agreement was negotiated by a Working Group, assisted by a Juridical Subcommittee, and referred for approval to the NATO Council Deputies. The available materials on the deliberations of the Working Group consist of the Summary Record of their meetings, MS-R (51) 1-26 and Documents, MS-D (51) 1-34; those on the work of the Juridical Subcommittee consist of the Summary Record of their meetings, MS-(J)-R (51)

era has not, however, been characterized by an abandonment of efforts to secure the maximum protection for American troops abroad. Nor has it meant ignoring the established bases for determining jurisdiction. These have continued to shape the attitudes of treaty negotiators, and have in a sense marked out the permissible limits of negotiation. It has been recognized, however, that the invocation of such abstract ideas as the territorial principle provides no clear and acceptable answer to many practical problems. The circumstances in which troops are stationed abroad are too varied, and the interests of the sending and receiving states too complex. Treaties have made possible more subtle differentiations in the allocation of jurisdiction, taking account of the multiple interests of sending and receiving states and the complex and differing scales through which they must be equated. Perhaps not all the treaty arrangements represent the optimum allocation of jurisdiction, but experience suggests that on the whole they have created a more workable pattern. International frictions have been reduced—no system has been devised which could eliminate them altogether.

The NATO Agreement is the most important of the post-war treaties. Perhaps the majority of our forces abroad are governed by its provisions, if one takes into account the arrangements with Japan and Iceland which are virtually identical. The Agreement with West Germany incorporates its provisions. Moreover, it has become the bench mark from which all status of forces arrangements are measured. The United States Senate has made it clear it will approve no arrangement which gives American troops a status inferior to that given them by the NATO Agreement. On the other hand, states outside NATO have not uncommonly asked for no less jurisdiction than the NATO Agreement gives a receiving state, in effect taking what may be termed a most-favored-nation approach. There are, however, agreements with non-NATO countries which reflect certain local circumstances and give the United States exclusive jurisdiction over its own forces.

1-6. Professor Joseph M. Snee, S.J., was kind enough to make copies of these materials available to the writer.

For the actions of the Council Deputies, references in that most valuable source, Snee & Pye, *Status of Forces Agreements and Criminal Jurisdiction* (1957) have been used.

It should be borne in mind always that *the above materials are reporters' summaries, not verbatim transcripts* of the proceedings.

Agreements for Exclusive Jurisdiction

A multipartite Convention between the United States, the United Kingdom, France and West Germany of 1952, as amended in 1954 governed the status of American forces in West Germany until July 1, 1963, when the present Agreement became effective. The Convention stated: "(1) Except as otherwise provided in the present Convention, the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Forces * * *." ¹⁸ An Exchange of Notes of July 12, 1950 (the invasion of South Korea began June 25, 1950), which gives exclusive jurisdiction over members of the United States Military Establishment in Korea to courts-martial of the United States, is still in effect.¹⁹ The Ethiopian Agreement of May 22, 1953 which gives the United States the right to occupy and use certain military facilities and installations in Ethiopia likewise gives the United States exclusive jurisdiction over its forces.²⁰ In the

¹⁸ Article 6, par. 2, provided: "Where under the law of the Power concerned, the service tribunals are not competent to exercise criminal jurisdiction over a member of the Forces, the German courts and authorities may exercise criminal jurisdiction over him in respect of an offense under German law committed against German interests" on certain conditions. [1955] 4 UST 4288, TIAS No. 3425.

¹⁹ The Exchange of Notes does not cover the United States Military Advisory Group to Korea. The Agreement to establish the Military Advisory Group, January 26, 1950, 2 UST 2696, TIAS No. 2436, 178 U.N.T.S. 102, provides in Article IV that "The Group and its dependents will be considered as a part of the Embassy of the United States in the Republic of Korea for the purposes of enjoying the privileges and immunities accorded to the Embassy and its personnel of comparable rank."

An earlier Agreement of August 24, 1948, [1951] 79 U.N.T.S. 62, had provided that "the Commanding General, United States Armed Forces in Korea, shall retain exclusive jurisdiction over the personnel of his command, both military and civilian, including their dependents, whose conduct as individuals shall be in keeping with the pertinent laws of the Republic of Korea."

The New York Times, June 23, 1962, p. 2, reported that the United States had agreed to negotiate a status of forces agreement with South Korea. "Such an agreement would give Korea jurisdiction over the American troops for crimes committed while off duty."

²⁰ The Agreement (Art. XVII, Part 1) provides simply that: "* * * 3. Members of the United States forces shall be immune from the criminal jurisdiction of Ethiopian courts. * * *" An Agreement of December 19, 1944, 93 U.N.T.S. 320, between the United Kingdom and Ethiopia gave the United Kingdom exclusive jurisdiction over its forces. See par. 5 of the Annexure to Article VI.

Agreement with Denmark for the Defense of Greenland provision is made that: "The Government of the United States of America shall have the right to exercise exclusive jurisdiction over those defense areas in Greenland for which it is responsible under Article II (3), and over any offenses which may be committed in Greenland by the aforesaid military or civilian personnel or by members of their families, as well as by other persons within such defense areas except Danish nationals, * * *" ²¹ To these agreements one should add the many Mutual Defense and Military Aid agreements to which the United States is a party. Although these agreements differ in detail, in general they recognize the exclusive jurisdiction of the United States over the personnel assigned to implement the agreements. Normally this is accomplished by assimilating such personnel to members of the diplomatic mission.²²

Finally, there are those agreements which differentiate between war and peace. The negotiators of the NATO Agreement discussed at several sessions whether the Agreement should be drafted to govern in time of war.²³ They were in accord that the

²¹ Article VIII. The World War II Agreement of April 9, 1941, E.A.S. No. 204, 35 A.J.I.L. (Supp.) 129 (1941) provided in Article VI that: "* * * the Government of the United States of America shall have exclusive jurisdiction over any such defense area in Greenland and over military and civilian personnel of the United States, and their families, as well as over all other persons within such areas except Danish citizens and native Greenlanders * * *."

²² "In Yugoslavia, Spain, Greece, Ethiopia, and Thailand, military assistance advisory group personnel enjoy full diplomatic immunity. In Iran, Iraq, Turkey, and Saudi Arabia they are subject to the concurrent jurisdiction of the United States and local courts.

"In the Philippines, senior officers enjoy full diplomatic immunities, while others are subject to jurisdiction of Philippine courts to the extent that other members of our forces stationed therein are subject thereto.

"In the Netherlands, Great Britain, Luxembourg, Norway, Belgium, France, Korea, Japan, Pakistan, Formosa, Brazil, Indonesia, Indochina, Colombia, Cuba, Denmark, Portugal, Chile, and Italy, their status is that of personnel of corresponding rank of the United States diplomatic mission." Deputy Under Secretary of State Robert Murphy, Hearings, H.J. Res. 309, *supra*, note 8, at 304.

See part 3 of the Reporters' Note to Section 65 of the Restatement, *Foreign Relations Law*, p. 209, for a discussion of the status of military advisory and assistance groups.

²³ The original United States Draft, as explained by the United States Representative, "provided that in time of war the sending State shall exer-

arrangements as to criminal jurisdiction on which these discussions centered were appropriate only for a time of peace.²⁴ The effort to formulate correlative arrangements to govern in time of war was finally abandoned. Rather the Agreement provides for review and modification by bilateral agreement of the parties concerned, reinforced by the right of any party to suspend any provision on sixty days' notice, in the event of hostilities.²⁵ The United States gave explicit notice that it would, in time of war,

cise sole jurisdiction in the case of offences committed by the members of its 'contingents'. This had a purely practical purpose: in time of war, it would be inadvisable that members of the force or assimilated personnel should be withdrawn from the control of their military authorities by reason of their subjection to the jurisdiction of the receiving State. The assumption of paragraph 10 did not appear in the Brussels Agreement, since the latter did not provide for time of war." MS-R (51) 4.

The United States later put forward a proposal that the Agreement should provide that " * * * in time of hostilities * * * the sending State shall have * * * the primary right to exercise criminal jurisdiction over members of its forces committing any offence within a receiving State except a security offense * * * committed against the receiving State." MS-D (51) 2. The United States later withdrew this proposal "as the whole question of conditions in war-time were being dealt with separately." MS-(J)-R (51) 5. See also MS-(J)-R (41) 9; MS-D (51) 11; MS-D (51) 11 (Revise); MS-D (51) 11 (2nd Revise); MS-R (51) 6; MS-R (51) 20.

²⁴ The French representative, in the course of a general discussion in the Juridical Subcommittee of the appropriateness of the proposed jurisdictional arrangements for war-time, observed "he thought that only Articles VII [on criminal jurisdiction] and VIII, and possibly III in so far as it referred to immigration regulations, might have to be withdrawn."

²⁵ "ARTICLE XV

1. Subject to paragraph 2 of this Article, this Agreement shall remain in force in the event of hostilities to which the North Atlantic Treaty applies, except that the provisions for settling claims in paragraphs 2 and 5 of Article VIII shall not apply to war damage, and that the provisions of the Agreement, and, in particular of Articles III and VII, shall immediately be reviewed by the Contracting Parties concerned, who may agree to such modifications as they may consider desirable regarding the application of the Agreement between them.

2. In the event of such hostilities, each of the Contracting Parties shall have the right, by giving 60 days' notice to the other Contracting Parties to suspend the application of any of the provisions of this Agreement so far as it is concerned. If this right is exercised, the Contracting Parties shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended."

insist on exclusive jurisdiction over its armed forces.²⁶ Other agreements similarly provide expressly for a shift in the arrangement regarding criminal jurisdiction in the event of war, to give the United States exclusive jurisdiction over its forces.²⁷

It may seem odd to group together agreements so diverse as those just reviewed, simply because they provide for or contemplate the possibility of exclusive jurisdiction in the United States as the sending state. The significant point, however, is the very diversity of the situations covered by these agreements. They demonstrate that there is no real norm with respect to the status of forces problem. Specifically, they show that there are a variety of situations in which exclusive jurisdiction in the sending state is or may be appropriate. The Convention with West

²⁶ "The United States Representative further recalled that in time of war the United States Government considered that those provisions relating to jurisdiction over its forces which were included in the Agreement, would no longer be adequate. In the event of hostilities, the United States Government desired to be able to exercise exclusive jurisdiction over their forces. He realized that under Article XV the United States Government had the right to denounce the Agreement in so far as the provisions in question were concerned." MS-R (51) 20. See also note 23, *supra*.

²⁷ The Agreement of March 14, 1947 with the Philippines, provides (Article XIII, 6) that "Notwithstanding the foregoing provisions, it is mutually agreed that in time of war the United States shall have the right to exercise exclusive jurisdiction over all offences which may be committed by members of the armed forces of the United States in the Philippines."

The revised Leased Bases Agreement with the United Kingdom spells out in detail the allocation of jurisdiction in war and in peace.

The criminal jurisdiction provisions of the Bahama Islands Agreement so closely parallel those of the revised Leased Bases Agreement that here as elsewhere references to the provisions of the revised Leased Bases Agreement may be considered as references to the Bahama Islands Agreement as well.

The Agreement with the Federation of the West Indies does not, on the other hand, call for any change in the agreed arrangements in the event of war.

The Agreement with the Dominican Republic provided in Art. XV (1) (a) that "Except as provided in subparagraph (b), the Government of the United States of America shall have the right to exercise exclusive criminal jurisdiction over any offenses committed in the Dominican Republic by: (i) Members of the United States Forces; (ii) Other persons subject to the United States military law except Dominican nationals or local aliens." Subparagraph (b) provided that "During a period of hostilities in which either government is engaged the principle stated in subparagraph (a) shall apply."

Germany was explicable as an interim arrangement for the period succeeding occupation. The Agreement regarding Greenland is plainly the product of the physical environment. Military personnel assigned to missions under Mutual Assistance Agreements do not constitute a military force, but serve in an advisory capacity. This makes their assimilation to the personnel of an embassy not unreasonable. The Agreement with Korea reflects the fact that, given the military build-up in North Korea, American troops in South Korea are necessarily maintained on a combat basis. Also, South Korea has relatively recently been ravaged by war, and this means that its social and governmental institutions, including its courts, were disorganized; there is also the continuing danger of Communist infiltration. Finally, there are many reasons for differentiating a war-time and peace-time situation, although the difference does not necessarily imply that a sending state should have exclusive jurisdiction in time of war.²⁸

The NATO Agreement

At the time the NATO Agreement was negotiated, Western Europe presented a quite different situation, for reasons which have no relation to the inherent capacity of a people to establish and maintain a just system of criminal law. The military threat was not so acute as in Korea, and there had been time since the end of World War II to reconstitute and revitalize the courts. The threat of Communist infiltration, while real enough, could apparently be effectively controlled. The number of visiting forces—particularly American forces—to be stationed in some of the Western European countries was expected to be large, much larger than in, say, Ethiopia. It was anticipated that they would be stationed in many different places in a single country, in circumstances which made likely much intermingling with the local population. Language barriers, although they existed, could be surmounted with relative ease. The legal systems of the several countries differed among each other and from that of the United States, but had enough common roots to make their major concepts familiar or at least readily understandable.

²⁸ The Agreement with Lebanon of August 6, 1958 provided, with respect to the status of the American forces then in the Lebanon, that "The military authorities of the United States shall have the exclusive right to exercise all criminal and disciplinary jurisdiction over all persons subject to its military law."

The Brussels Treaty Powers had shown their conviction that, in the conditions prevailing in Western Europe, the territorial principle should control, and visiting forces should enjoy no blanket immunity. The NATO Agreement reflects a modification of this attitude, but the territorial principle remains the norm. The Agreement, in keeping with that principle, for practical purposes gives the receiving state primary jurisdiction, and the sending state only secondary, subordinate jurisdiction over all offenses except those arising out of acts in the performance of duty and offenses in which both the offender and the victim are members of or accompany the armed forces. With respect to the excepted offenses, the sending state has primary jurisdiction.

It will be recalled that, in general, international law establishes no rules of priority where two or more states have concurrent jurisdiction over the same offense. The useful, conflict-resolving concept of "primary jurisdiction" and "secondary jurisdiction" is, in the status of forces area, a creation of treaties. It apparently first appeared in the Agreement of March 27, 1941, relating to the Leased Bases, and reached full flower in the NATO Agreement. Broadly speaking, however, the concept of primary and secondary jurisdiction is not new. It is involved somewhat in extradition treaties in those instances where a state may be requested to surrender one of its own nationals to the state where the offense occurred, even though the requested state could otherwise try this individual under its own laws. The same is true where an offense occurs on a merchant vessel in a foreign port. On the basis at least of comity the primary right to exercise jurisdiction is accorded the littoral state or the flag state, depending on such factors as whether the peace of the port was disturbed. The state of which the offending seaman is a national is, moreover, normally prepared to recognize the prior right of either the littoral or the flag state to exercise jurisdiction. Every immunity, moreover, can be said to involve no more than the recognition of a primary right to exercise jurisdiction, since an immunity can always be waived.

Formerly, in the status of forces area, either the sending state (or on occasion the receiving state, e.g., the United Kingdom, under the Allied Forces Act, 1940, with respect to murder, manslaughter and rape) successfully claimed exclusive jurisdiction; or, where the concurrent jurisdiction of the sending and receiving state was recognized, each case was a matter for separate negotia-

tion. Physical custody of the accused was presumably the most important factor. Thus, in Great Britain, neither the Visiting Forces (British Commonwealth) Act, 1933, nor the Allied Forces Act (1940) except with regard to the offenses mentioned above, made any provision for resolving the conflict inherent in the recognition of concurrent jurisdiction in the sending and receiving states. The use of the concept of primary and secondary jurisdiction to resolve such conflicts in advance represents a notable forward step.

The NATO Agreement also accords jurisdiction to the sending state—necessarily exclusive—over offenses solely punishable by the law of the sending state. This is significant largely with respect to security offenses and purely military offenses, e.g., AWOL. Since the receiving state could not exercise jurisdiction in these cases, the grant is not of immunity but simply of the right to exercise jurisdiction. The inclusion of the provision was probably unnecessary.

To summarize briefly, our allies have, since the end of World War II, made it clear they neither agreed that any rule of international law required they accord a sending state exclusive jurisdiction over its forces, nor believed that granting such exclusive jurisdiction was, except in special circumstances, appropriate at least in time of peace. The United States has accordingly obtained by negotiated agreements a qualified status for its armed forces.

CHAPTER VIII

CLASSES OF PERSONS COVERED BY STATUS OF FORCES AGREEMENTS

Prior to the treaty era, sending states were prone to claim blanket immunity for their troops, and receiving states to claim complete jurisdiction over them. The treaty era has been characterized by more qualified claims, giving rise to allocations of jurisdiction recognizing the legitimate interests of both sending and receiving states. The status of the accused, in terms of his relationship to both the sending and receiving states has, in this connection, come under closer scrutiny. Every relationship to the sending state's armed forces is not of itself enough to affect jurisdiction.

Delimiting the categories of individuals who should be covered by the NATO Agreement gave rise to one of the major controversies in the NATO negotiations. The solutions reached in the NATO Agreement, as well as in other status of forces agreements, were predicated on the assumption that American courts-martial could constitutionally try civilian employees of the armed forces and dependents.¹ Those solutions will be analyzed initially without reference to the later decisions² of the Supreme Court denying such jurisdiction to American courts-martial in peacetime. The analysis indicates that some civilian employees and, particularly, dependents were commonly not included among those, jurisdiction over whom was qualified by the treaty. This suggests that the impact of the Supreme Court decisions was somewhat less than many have assumed, although the appraisal should take into account that many receiving states were prepared, prior to the Supreme Court decisions, to waive their jurisdiction over civilian employees and dependents in many instances.

¹ *Madson v. Kinsella*, 343 U.S. 341 (1952).

² *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Gresham v. Hagen*, 361 U.S. 278 (1960); *McElroy v. Guagliardo* and *Wilson v. Bohlander*, 361 U.S. 281 (1960).

MEMBERS OF THE ARMED FORCES

There was no significant difference of opinion among the NATO negotiators regarding the appropriateness of granting the agreed range of immunities to all members of the armed forces.³ There was substantial agreement that the relationship between a state and a member of its armed forces was the paramount relationship. Nationality, even in the receiving state, should not affect the status of members of a visiting force.⁴ This is also true under

³ It seems clear enough that the NATO agreement does not modify the rule of international law regarding the status of the crews of warships in the territorial waters and ports of another state when on board. It is true that the Agreement uses the phrases "when in the territory," "within the territory" and the like, e.g., in Article I 1 (a), defining "force" as "the personnel belonging to the land, sea or air armed forces of one Contracting Party when in the territory of another Contracting Party," and it could be said that "territory" includes territorial waters and ports. See *Cunard v. Mellon*, 262 U.S. 100 (1923). It seems implicit in Article VII as a whole, however, that it was intended to apply only to armed forces on land, and such phrases as that in the Preamble, "Considering that the forces of one Party may be sent, by arrangement, to serve in the territory of another Party," point to the same conclusion. Apparently the point was never raised in the negotiations; it seems inconceivable that if the negotiators had intended to change the well-established rule regarding the crews of warships, they would have done so without discussion.

It is equally clear that the status of crews of warships on shore is governed by the Agreement.

⁴ Apparently only the Portuguese Representative felt that nationality in the receiving state should prevail over membership in the visiting force. "He pointed out that under the present text, nationals of the receiving State who were members of a foreign force present in the territory of the receiving State, could escape by this means from the application of the laws of their country. He thought it would be unfortunate if there were any difference of treatment between a Portuguese soldier, for example, who was a member of the Portuguese army, and a Portuguese soldier who was a member of a United States force present in Portugal. The same restriction should be adopted for the members of a force or for those of a civilian component."

The Chairman answered, in part, that "it might be dangerous in certain cases, under Articles VII [on criminal jurisdiction] and VIII, for example, to withdraw the privileges given * * * from nationals who were members of a force." MS-R (51) 13. See also MS (D) 51-16.

The soundness of the NATO solution is evident when, as under the NATO Agreement, members of the visiting force enjoy only a qualified immunity, for *inter se* offenses and offenses committed in the performance of duty. It is less evident, though on balance still defensible, when the immunity of the members of the visiting force extends to private acts which are not *inter se*

other recent agreements, with some exceptions.⁵ The NATO approach is consistent with prior practice⁶ and with prevailing attitudes with respect to the crews of merchant vessels as well as

offenses. Then to disregard nationality means that one who, while in the pursuit of his private interests, commits an offense in the state of which he is a national against a fellow national, is immune from that state's jurisdiction.

⁵ The Convention with West Germany provided: "The definition 'members of the Forces' shall include Germans only if they enlisted or were inducted into, or were employed by, the armed Forces of the Power concerned in the territory of that Power and at that time either had their permanent place of residence there or had been resident there at least a year."

The Protocol of Signature to the Agreement with West Germany takes a different approach, providing in the Agreed Minutes Re Article I that "Except in cases of military exigency, the Governments of the sending States will make every effort not to station in territory of the Federal Republic as members of a force persons who are solely Germans."

Under the Leased Bases Agreement the United States was accorded primary jurisdiction (Art. IV (1) (C)) in cases in which "A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area. * * *" Under the Agreement the "person" could be a member of the United States armed forces, so that in this instance the status of a member of such forces did vary from the norm if he was a British subject. Under the revised Leased Bases Agreement, however, "British Subject" is defined so as to exclude "a member of a United States force" (Art. IV, para. (9)), and nationality no longer affects the status of American troops.

The definitions of the term "United States Forces" in both the United States-Ethiopian Agreement and the United States-Libya Agreement are so phrased as to leave some doubt whether nationality affects the status of a member of the force. The problem is not likely to arise in either country. Under the Philippines Agreement, on the other hand—and there the matter is of practical importance—the possibility that nationality could affect the status of a member of the United States force is expressly negated in the crucial case. The Agreement gives the United States jurisdiction over "Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) * * *."

⁶ See Note 14, *infra*. None of the agreements there cited excepts from the members of a force nonnationals of the sending state, including nationals of the receiving state. The Anglo-French treaty of Dec. 15, 1915 (*supra*, p. 116) referred to "persons belonging to these Armies * * * of whatever nationality the accused may be," and the Franco-American notes of January 3 and January 14, 1918 (*supra*, p. 116) to "persons subject to the jurisdiction of those forces whatever be * * * the nationality of the accused," a phrase which was repeated in both drafts of the proposed World War I Anglo-American Agreement (*supra*, p. 122, n. 30).

warships, although as to diplomats the trend is to the contrary.⁷

The NATO Agreement also resolved, on the whole in favor of the sending state, several lesser issues which had caused difficulty in the past. It had been asserted that any immunity which visiting forces might enjoy under international law was accorded to them only as members of a unit. Therefore, it was said, a member of an armed force was not entitled to immunity in a country other than that in which his unit was stationed, even though he was there on duty. The same attitude was expressed in the course of the NATO negotiations.⁸ The Agreement nevertheless clearly accords the agreed immunities to such detached members of a force, as well as to those on leave or even AWOL in the state in which their unit is stationed; they are in the state "in connexion with their official duties."⁹ Those on leave or AWOL in a member state in which no unit of their force is stationed are as clearly not entitled to immunity.¹⁰ Technically, the same is true regarding those on leave in a state in which units of their force, but not their unit, are stationed. In practice, however, they are accorded the agreed immunities.¹¹

⁷ Article 38 of the Vienna Convention on Diplomatic Relations, signed April 18, 1961, provides: "1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions." Paragraph 2 of Article 38 limits the immunities of other members of the staff and servants to those "admitted by the receiving State." See also Articles 8 and 37 of the Convention, and Section 77 of the Restatement, *Foreign Relations Law*, p. 255.

For earlier views, see Hall, p. 229, footnote, and Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," 10 N.Y.U.L. Rev. 170, 176 (1932).

⁸ MS-R (51) 13. Comment a to Section 54 of the Restatement, *Foreign Relations Law*, p. 182, states that "Detached military personnel on recreational status or on individual assignment are not within the meaning of the term 'force.'"

⁹ "The Working Group recognized that the Article should be so amended as * * * not to exclude the case of members of a force on leave in the same State in which their force was present." MS-R (51) 13.

¹⁰ The words "in connexion with their official duties" were inserted to meet the objection of the Danish and Norwegian representatives who felt "that members of a force who might be present in Denmark on leave, for example, could hardly be covered by the Agreement." MS-R (51) 13.

¹¹ Snee and Pye, *Status of Forces Agreements and Criminal Jurisdiction* 13 (1957). The Agreement between the Federal Republic of Germany and

The practical consequences of including those on temporary duty or, in some circumstances, on leave among those covered by a treaty should be kept in mind in considering whether according that status is justified. Under the NATO Agreement it can mean primary jurisdiction in the sending state only for offenses in the performance of duty and *inter se* offenses. For those on leave or AWOL, it can normally mean only immunity for *inter se* offenses. Not all the earlier treaties dealt with temporary duty and leave situations in the same way as the NATO Agreement does,¹² nor do all the post-World War II treaties.¹³

the United States of America on the Status of Persons on Leave, signed the same day as the Agreement with West Germany, specifically accords the standard immunities to members of the armed forces and civilian employees stationed in Europe or North Africa and their dependents when on leave in West Germany.

¹² The Anglo-French Declaration of Dec. 15, 1915 (*supra*, p. 116) used the phrase "persons belonging to these Armies in whatever territory and of whatever nationality the accused may be." The American agreements with France (*supra*, p. 116, n. 13) and Belgium (*supra*, p. 117, n. 14) read: "persons subject to the jurisdiction of those forces whatever the territory in which they operate or the nationality of the accused," as did the Draft Agreement proposed by the British and the United States governments (*supra*, p. 122, n. 30). Either phrase, read literally, seems broad enough to cover those on temporary duty and on leave, but in *Rex v. Aughet*, *supra*, p. 119, n. 21, the British government apparently took the position that the Anglo-Belgian treaty, comparable to the Anglo-French Declaration, did not cover those on temporary duty. The holding was, however, that it did. All these agreements gave exclusive jurisdiction to the sending state.

¹³ It appears that under the Agreements with Korea, Saudi Arabia, Ethiopia, the revised Leased Bases Agreement, and the Agreement with the Philippines, the occasion for the presence of a member of the United States forces in the receiving state is immaterial, as it was under the Convention with West Germany. But the Agreement with Iceland uses the phrase "all such personnel being in the territory of Iceland in connection with operations under this Agreement"; that with Libya "who are in the territory of Libya in connection with operations under the present Agreement"; that with the Federation of the West Indies "who are there solely for the purposes of this Agreement"; and that with Australia "in Australia in connection with activities agreed upon by the two Governments." See also the British Agreement with Ethiopia, [1951] 93 U.N.T.S. 320. In none of these states could the situation arise of a member of the United States forces being on temporary duty or on leave in a state in which no United States forces were stationed, as it can in some NATO countries.

CIVILIANS

Whether civilians employed by visiting armed forces—the so-called “civilian component”—should have the same immunity from the jurisdiction of the receiving state as members of visiting armed forces provoked prolonged debate among the NATO negotiators. There was, however, general agreement that dependents should not enjoy such immunities.

The comments of writers regarding the immunity of armed forces characteristically make no reference to the civilian component and prior agreements show no consistent pattern.¹⁴ There

¹⁴ “That Act [The United States of America (Visiting Forces) Act, 1942 of the United Kingdom] goes beyond the [Anglo-French] declaration of 1915 and international usage in its inclusion of persons and groups who are not technically members of military forces but are associated with them and are subject to military law.” Rand, J., in *Reference Re Exemption of U.S. Forces from Canadian Criminal Law*, [1943] 4 D.L.R. 11, 48. See also *Chow Hung Ching v. The King*, 77 Commw. L.R. 449 (Aust. 1948), distinguishable because the civilians there involved were not accompanying an armed force.

The Anglo-French Declaration of Dec. 15, 1915 (*supra*, p. 116), the model for many of the World War I agreements, referred to “the exclusive competence of the tribunals of their respective Armies with regard to persons belonging to these Armies,” and left to local jurisdiction “persons not belonging to” the armies. The Exchange of Notes of January 3 and 14, 1918 between the United States and France used the broader phrase, “persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused,” and the word “persons” was defined to include “together with the persons enrolled in the Army, Navy and Marine Corps, any other person who under the American or French law is subject to military or naval jurisdiction, especially members of the Red Cross regularly accepted by the Government of the United States of America or the Government of the French Republic in so far as the American or French law and the customs of war place them under military or naval jurisdiction.” The Belgian-American Exchange of Notes of July 5 and September 6, 1918 incorporated the same provisions, as did the American draft of the proposed agreement with Great Britain of August 13, 1919; the British draft of May 31, 1919 had omitted the provision defining “persons.”

The United States of America (Visiting Forces) Act, 1942, 5 and 6 Geo. 6, c. 31, applied to “a member of the military or naval forces of the United States of America,” but further provided that “For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military

or naval law of that country shall be deemed to be members of the said forces."

The World War II agreements show no consistent pattern. The Chinese-American Arrangement of May 21, 1943, 57 Stat. 1248, E.A.S. 360, [1948] 14 U.N.T.S. 358, and the Agreement between the United States and Belgium relating to the Congo, [1951] 109 U.N.T.S. 150, refer only to "members of such forces." The Sino-British Agreement of July 7, 1945, [1948] 14 U.N.T.S. 462 "* * * includes uniformed members (i) of political or civil staffs attached to the British forces, (ii) of the women's auxiliary to the said forces, (iii) of the nursing staffs, male and female, (iv) of the staff of the Navy, Army and Air Force Institutes * * * members of the crews (other than Chinese nationals) of merchant ships belonging to or chartered or requisitioned by or on behalf of the Government of the United Kingdom * * * who are operating in conjunction with the British naval authorities."

The Agreement of March 31, 1942 between the United States and Liberia, 56 Stat. 1621, E.A.S. 275, [1948-49] 23 U.N.T.S. 302, covered "the military and civilian personnel of the Government of the United States and their families." The United States-Netherlands Agreement of May 16, 1944, [1951] 1 UST & OIA 601, TIAS No. 2212, [1952] 132 U.N.T.S. 356, and the Anglo-Belgian Agreement of the same date, [1951] 90 U.N.T.S. 284, contained virtually identical provisions, that in the former reading "the Service courts and authorities of the Allies * * * will have exclusive jurisdiction over all members of their forces and over all persons of non-Netherlands nationality not belonging to such forces who are employed by or who accompany those forces and are subject to their naval, military or air force law." The Agreement between the United States and France of August 25, 1944, *supra*, p. 114, provided that "British or American nationals not belonging to such forces who are employed by or who accompany these forces, and are subject to Allied Naval, Military or Air Force Law, will for this purpose be regarded as members of the Allied Forces. The same will apply to such persons, if possessing the nationality of another Allied state provided they were not first recruited in any French territory. If they were so recruited they will be subject to French jurisdiction in the absence of other arrangements between the authorities of their state and the French authorities." The Agreement of September 3, 1947 between the United States and Italy, 61 Stat. 3661, TIAS No. 1694, [1950] 67 U.N.T.S. 16, stated:

"13. The term 'United States Forces' when used in this agreement shall be defined as United States Armed Forces including persons of non-Italian nationality not belonging to such forces but who are employed by or who accompany or serve with those forces and the dependents of such persons, and Governmental organizations and accredited agencies operating under or in conjunction with such forces whenever applicable. Included in the foregoing are:

Class I. United States citizens who are:

1. War Department civilian employees
2. Personnel of the American Red Cross
3. Personnel employed by the Army Exchange Service

is a discernible functional basis for granting such civilians immunity, but the functions they serve are so diverse that one cannot generalize, and in any event the argument seems less compelling than in the case of military personnel. Perhaps a better case can be made on the basis that maintaining discipline and control over the armed forces requires that the commander also be able to maintain discipline and control over those accompanying the force, and this requires exclusive jurisdiction in the sending state. It can hardly be said, however, that any rule of international law accords immunity—except, possibly, for official acts—to civilian employees accompanying armed forces, whatever the rule may be regarding members of such forces. The success of the American representatives in securing the same immunities for the civilian component as for members of the armed forces under the NATO Agreement involved a major concession by other NATO members.¹⁵

The original American draft would have given the same status to military personnel and the civilian component, together constituting the “contingent,” defined as those subject to the military

4. Other personnel possessing United States Armed Forces orders, for the period covered by the order.

Class II. United States citizens and aliens who are:

1. Dependents of United States Armed Forces personnel, regardless of nationality.
2. Dependents of Class I personnel indicated above.

It can be said of these agreements, in general, that the United States and Great Britain (but not other states) were largely successful in obtaining immunity for civilians accompanying their forces—the dominant but not exclusive criterion being that the civilians were “subject to military or naval law”; that nationality in the receiving state, or in a third state, often disqualified a civilian; and that dependents were specifically referred to in only two agreements, those with Italy and Liberia.

¹⁵ Section 64 of the Restatement, *Foreign Relations Law*, p. 199, states that “Except as otherwise expressly indicated by the territorial state, civilians accompanying a force that is present in the territory of another state with its consent are treated as members of the force for the purposes of the rules stated in Sections 58–63 only if

(a) they are employed by the sending state to perform duties closely related to the operation of the force and

(b) they are subject to the rules governing the discipline and internal administration of the force under the law of the sending state.”

See also the Reporters’ Note 2 (e) to Section 65, which states that the NATO Agreement “reflects the rule of international law stated in Section 64.”

law of the sending state.¹⁶ This approach met with vigorous opposition, particularly from the British representative.¹⁷ The disagreement was resolved by incorporating a separate definition of the civilian component, which speaks of those "in the employ of an armed service" of the sending state rather than those subject to its military law, thus according the civilian component a separate status.¹⁸ Some of the negotiators believed, however, that

¹⁶ The American representative stated the definition "arose out of United States Military Legislation, which assimilated certain categories of civilians to the military personnel; military legislation applied to them, even in time of peace, outside the national territories and certain territories under United States control." MS-R (51) 2. He quoted Article 2 (11) and (12) of the Uniform Code of Military Justice, 70 A Stat. 37, 10 U.S.C. 802.

¹⁷ His objections were: (1) civilians accompanying the armed forces abroad were, under the law of perhaps a majority of states, subject to military law in time of peace, but under British law were so subject only in time of war; (2) as a result, the civilians of some sending states might not enjoy the same status as those of other sending states; (3) civilians were accorded no immunity under the Brussels Treaty; (4) civilians accompanying the United States forces in the United Kingdom did not have the same status as the armed forces (but see note 14, *supra*); (5) civilians accompanying armed forces are few in number, move as individuals or in small groups, and are not subject to the same close discipline as the armed forces; (6) their duties are so various that defining those to be included would be difficult, and would require a system of identification which, in time of stress, might be difficult to control. MS-R (51) 2; MS-D (51) 3. But in the debate on the Bill to implement the NATO Agreement, the British Attorney General said: "We know that visiting forces, including our own, are likely to have people with them who are not citizens of the receiving country. They are for all practical purposes a part of the visiting forces. In these circumstances it does not seem in the least unreasonable that they should be covered." 505 H.C. Deb. (5th ser.) 1155, (1952).

¹⁸ The United States Representative first agreed to eliminate the reference to military law, proposing to substitute "persons serving with, employed by, or accompanying the armed forces." He then agreed, when it was objected that "accompanying" was too vague, to eliminate that word, "since the civilians in question were accompanying the military forces 'in the execution of orders', and, for this reason, they could be regarded as serving with the military forces or employed by them." Finally, it was agreed it would be preferable to cover civilians by a separate definition, which should apply to all civilian components of the armed forces "whether they were employed by the armed forces or acting under orders." MS (J)-R (51) 1.

The definition ultimately incorporated in the Agreement, Article I 1 (b) is "the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to

members of the civilian contingent who were nationals of the receiving state should in no event be immune from its jurisdiction. They had agreed that the relationship between a member of a visiting force and the sending state should be controlling, but were not prepared to agree that the relationship between a member of the civilian contingent and the sending state should prevail over nationality in the receiving state. The definition of "civilian component" was therefore framed to exclude nationals of the receiving state and also those ordinarily resident in that state. This, coupled with the exclusion of stateless persons and nationals of states not members of NATO, falls significantly short of a requirement of nationality in the sending state.¹⁹

the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located."

Difficulties of identification remain. The British Home Secretary, in the debate on the Bill to implement the NATO Agreement, noted that " * * * the description of civilian component in the Agreement has not enough legal certainty to be translated into terms of United Kingdom law, particularly as the arrangements vary in the different countries. * * *." The Bill hence set up a procedure for passports to be marked by the sending state and endorsed by an official of the United Kingdom. 505 H.C. Deb. (5th ser.) 568 (1952).

¹⁹ "13. With respect to paragraph (b) THE FRENCH REPRESENTATIVE proposed that the definition of the civilian personnel should specify that such personnel should possess the nationality of the sending State. Problems difficult to solve might arise, particularly under the application of Article VII, if the members of the civilian component belonged to a third nationality or were stateless.

"14. THE UNITED STATES REPRESENTATIVE argued that under United States military regulations, civilian personnel accompanying the forces were subject to the same discipline as the military personnel. Moreover, the United States would certainly include in the civilian component persons belonging to a different nationality from that of the sending or receiving States. The restriction proposed by the French Representative would leave members of a civilian component belonging to a third nationality without protection.

"15. THE FRENCH REPRESENTATIVE said that the French Government was primarily concerned to obviate those difficulties which would arise at the time of entry into France of persons not belonging to the nationality of a NATO country or stateless persons. In some cases, such persons would be liable to be refused entry by the French Government.

"16. THE CHAIRMAN proposed that Article I (b) should specify that the Agreement covered members of a civilian component who were not nationals of the receiving State, and further were neither stateless nor the nationals of a country other than the NATO countries.

The definitions in Article I of the NATO Agreement are important only because they are relevant to the meaning of the crucial provisions of Article VII, granting and allocating jurisdiction. By Article VII 1. (a) the military authorities of the sending state can exercise in the receiving state the criminal and disciplinary jurisdiction conferred on them by the sending state's law "over all persons subject to the military law of that State." To the extent that this gives such authorities the right to exercise jurisdiction over others than members of their armed forces, the grant goes beyond any requirement of international law. The record indicates the concern of some of the negotiators that this grant might be interpreted too broadly.²⁰ Ultimately

"17. THE FRENCH REPRESENTATIVE signified his willingness to submit this new wording to his Government."

MS-R (51) 13. See also MS-D (51) 19.

²⁰ "15. In the same paragraph, several amendments had been submitted with a view to altering the categories of persons subject to the jurisdiction of the military authorities of the sending State. There were two alternative proposals: either to replace the existing phrase 'all persons subject to the military law of the sending State' by the wording 'members of its force or civilian component', or to add 'dependents'.

"16. Several Representatives expressed the opinion that the existing wording was too comprehensive. Its effect would be to enable the receiving State to render anyone subject to its jurisdiction, merely by amending those provisions in the national legislation which specified which categories of persons were subject to military law. On the other hand, the deletion of the term 'persons subject to military law' would prevent the sending State from exercising its jurisdiction in cases where it would be normal for it to do so (for example, in the case of a spy). It was argued in reply, that a distinction should be drawn between two separate problems, first, which persons were subject to military law, and secondly, what were the powers of the military courts. In certain cases and in certain countries, persons who were not subject to military law (for example, nurses) were nevertheless subject to the jurisdiction of military courts. Lastly, a number of Representatives were doubtful whether dependents could be included.

"17. THE FRENCH REPRESENTATIVE recalled that the existing text was already a compromise which had been reached after a lengthy discussion. He suggested that the difficulty might be solved by retaining the existing text as it stood, while adding the paragraph proposed by the Danish Delegation, which read as follows:

'The above provisions shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or permanent residents in the receiving State, unless they are members of the forces of the sending State'.

"18. This proposal was accepted by the Working Group, subject to the

they were apparently satisfied that it would not, generally, be interpreted to include others than members of a force and the civilian component.²¹ They wished, however, to preclude any possibility that nationals or residents of the receiving state who had no relation to the visiting force would be considered subject to the jurisdiction of the sending state. The concern with respect to the civilian component was primarily that nationals of the receiving state should continue to be punishable under the local criminal law; with respect to those having no relation to the visiting force, the primary concern was to protect them from foreign jurisdiction.²² It will be recalled that nationals of the

Chairman's reservation of his position with respect to the definition of residents."

MS-R (51) 14.

²¹ "8. It was recalled that it had been previously agreed [though the documents do not so indicate] that the phrase 'persons subject to the military law' should be replaced by the phrase 'members of a force or civilian component.'

"9. THE CHAIRMAN pointed out that this paragraph did not call for the amendment which had been made in other Articles, since there was no risk of misunderstanding its meaning. The original wording was retained.

"10. THE FRENCH REPRESENTATIVE was prepared to accept this wording, but felt bound to point out that the phrase 'subject to military law' had a very restricted meaning in France in peacetime. This wording would therefore appreciably reduce the powers of France as a sending State. The French Government, on their side, would regard members of a force or civilian component as falling within the scope of the paragraph. The Italian and Belgian Representatives associated themselves with this statement.

"11. The Working Group agreed that this official statement by the Representatives of France, Italy and Belgium should be placed on Record." MS-R (51) 18.

²² The point was raised by the Danish Government:

"The Danish Government assumes that the sole purpose of the draft Agreement is to regulate the status of members of a 'force' or a 'civilian component' and, to a certain extent, of 'dependents' of the Contracting Parties. It is, therefore, assumed that the jurisdictional provisions of the draft do not purport to grant any authority to exercise jurisdiction over any person that is not a member of its force or civilian components. This interpretation of Article VII is presupposed in the definition contained in Article 1 (f) of the draft, and in the provision in paragraph 8 of Article VII, which also seems to appear from NATO document MS (J)-R (51) 6, paragraph 11.

"In the opinion of the Danish Government there exists, however, the possibility that, apart from the context, the provisions in paragraph 1(a), paragraph 2, 1st subsection, and paragraph 3(b) might be interpreted as grant-

receiving state had been subjected to the jurisdiction of foreign military authorities in combat zones in wartime. The first of the World War I agreements had been designed expressly to negative such jurisdiction. There seems to be no basis whatever for saying they would be so subject in time of peace, except possibly for offenses committed on a base being used by a foreign force. The NATO Agreement, nevertheless, out of what may be considered an abundance of caution which suggests the major importance attached to the issue, expressly negatives any inference that the grant of jurisdiction in Article VII 1. (a) extends to nationals of or those ordinarily resident in the receiving state, other than members of the visiting force.²³

ing to the military authorities of the sending State the right to exercise jurisdiction (as regards paragraph 3(b): subsidiary jurisdiction) even over nationals and permanent residents of the receiving State, i.e., to the extent to which these persons, in time of peace or war, come under the military law of the sending State. In order to clarify this matter beyond all doubt, the following alternative amendments to Article VII are submitted:

(a) In paragraph 1(a) and paragraph 2, 1st subsection, the words 'all persons subject to the military law of that State' and 'persons subject to the military law of that State' should be substituted by 'members of their force or civilian component', or

(b) In paragraph 1(a) and paragraph 2, 1st subsection, the words 'all persons' and 'persons' should be substituted by 'members of their force or civilian component', or

(c) A new paragraph shall be inserted before the present paragraph 4;

'The above provisions shall not imply the right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or permanent residents in the receiving State, unless they are members of the forces of the sending State.'" MS-D (51) 18. The first two amendments proposed were rejected but the third adopted. See note 20, *supra*.

²³ Article VII 4 states: "The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State."

The Agreement with the Federation of the West Indies provides in Article XI(4) that: "The foregoing provision of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who belong to, or are ordinarily resident in, the Federation unless they are military members of the United States Forces." See also Article 8(4) of the Agreement with Australia.

The status to be accorded dependents occasioned much less difficulty. Apparently no representative vigorously urged that dependents were entitled to immunity under international law or should be accorded any immunity under the Agreement. There appears to be a complete absence of authority for the conclusion that any immunity enjoyed by a visiting armed force extends to dependents. The earlier treaties which regulated the status of visiting forces only rarely mentioned dependents expressly,²⁴ and it is doubtful that the language of other treaties could be interpreted broadly enough to include them. In part this reflects the fact that the problem is largely new.

It has now become not uncommon for dependents to accompany armed forces, including those of the United States, to some though not all foreign countries in which such armed forces are stationed. The negotiators of the NATO Agreement anticipated this in the NATO area. They did not, however, believe that giving dependents immunity of any kind in so far as criminal jurisdiction is concerned could be justified.²⁵ It has been convincingly demonstrated²⁶ that an analysis of Article VII of the NATO Agreement as a whole leads to the conclusion that dependents are not included among those accorded the agreed immunities—though they in fact enjoy certain immunities in some countries²⁷—and that the negotiators did not intend they should be.

²⁴ The Agreement between the United States and Liberia of March 31, 1942, 56 Stat. 1621, E.A.S. 275, [1948-49] 23 U.N.T.S. 302, gave immunity to "the military and civilian personnel of the Government of the United States and their families"; the Agreement of September 3, 1947 between the United States and Italy, [1950] 67 U.N.T.S. 16, *supra*, note 14, also gave treaty status to dependents. See also the Anglo-Egyptian Treaty of 1936, U.K.T.S. No. 6 (1937).

The Reporters' Note 2 (e) to Section 65 of the Restatement, *Foreign Relations Law*, p. 208, states with respect to the status accorded dependents in the NATO Agreement that: "[T]he parties were in a position to deal with this special situation not previously regulated by international law."

²⁵ " * * * [A] number of representatives were doubtful whether dependents could be included." MS-R (51) 14. One is tempted to suggest an analogy between dependents and passengers on a ship, or a "stranger to the vessel," but the differences are as real as the similarities.

²⁶ Snee and Pye, *Status of Forces Agreements and Criminal Jurisdiction* 34-40 (1957).

²⁷ The Agreement between the United States and West Germany on the Status of Persons on Leave covers dependents.

The status of dependents is nevertheless significant for other purposes.²⁸

Favorable as the NATO Agreement is to a sending state with respect to jurisdiction over members of a force and the civilian component, the jurisdiction which it accords to the military authorities of the sending state falls short of that which Article 2(11) of the Uniform Code of Military Justice purported to give to American military authorities. Article 2(11) contains no limitation based on nationality, no requirement that the individual be employed by the armed forces in a strict sense, and was deemed to include dependents.²⁹

The other post-World War II treaties to which the United States is a party have provisions different from those of the NATO Agreement defining the classes of persons covered other than members of the armed forces. Some define the classes broadly enough apparently to include all those covered by Article 2 (11) of the Uniform Code of Military Justice, including dependents. Provisions of this type appear in the superseded Convention with West Germany,³⁰ the United States-Ethiopian

²⁸ E.g., an offense by a member of a force or of a civilian component against a dependent is an *inter se* offense (Art. VII, 3(a)(i)) and a dependent is entitled, when tried by the receiving state, to the rights enumerated in Article VII, 9.

"Dependent" is defined, in Article I, 1(c) as "the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support." Parents are not included, but are in the Agreement with Japan, Article I (c) which, however, excludes children over 21 unless "dependent for over half their support." The Agreement with West Germany extends the concept to "close relatives" who meet certain requirements. Article 2, 2(c). But the Agreed Minutes provide that "The authorities of the forces shall limit as far as possible the number of close relatives * * * to be admitted to the Federal territory."

Many agreements use the term "dependents" without defining it.

²⁹ Snee and Pye, *op. cit. supra* note 11, at 15; *United States v. Weiman & Czevtok*, 3 U.S.C.M.A. 216, 11 C.M.R. 216 (1953). But see the decisions of the Supreme Court regarding the constitutionality of Article 2(11), *supra*, note 2.

³⁰ Article 1, 7 defines Members of the Forces to include:

"(b) Other persons who are in the service of such armed Forces or attached to them, with the exception of persons who are nationals neither of one of the Three Powers nor of another Sending State and have been engaged in the Federal territory; provided that any such persons who

Agreement,³¹ the United States-Libyan Agreement³² and the Agreement with Korea.³³ The Agreement with Japan defines "civilian component" more broadly than does the NATO Agreement;³⁴ hence under American primary jurisdiction with respect

are stationed outside the Federal territory or Berlin shall be deemed to be members of the Forces only if they are present in the Federal Territory on duty (followers).

"The following are considered 'members of the Forces': dependents who are the spouses and children of persons defined in subparagraphs (a) and (b) of this paragraph or close relatives who are represented by such persons and for whom such persons are entitled to receive material assistance from the Forces. The definition 'members of the Forces' shall include Germans only if they enlisted or were inducted into, or were employed by, the armed Forces of the Power concerned in the territory of that Power and at that time either had their permanent place of residence there or had been resident there for at least a year."

³¹ Article XXIV states: "The term 'United States forces' includes members of the armed forces of the United States (including dependents of all such members) and persons accompanying, serving with or employed by said forces (including dependents of all such persons) who are subject to the military laws of the United States, but excluding indigenous Ethiopian nationals and other persons ordinarily resident in Ethiopian territory provided that such nationals or other persons are not dependents of members of the United States forces."

³² Article XXVIII states: "'United States forces' include personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such services (including the dependents of such military and civilian personnel), who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement."

The Agreement with the Federation of the West Indies includes in the definition of "Members of the United States Forces" in Article I: "[C]ivilian personnel accompanying the United States Forces and in their employ who are not ordinarily resident in the Federation and who are there solely for the purposes of this Agreement" and dependents. But see Article XI (4) of the Agreement, *supra* note 23.

³³ The United States is granted exclusive jurisdiction "over members of the United States Military Establishment in Korea"; the phrase is not further defined. The prior Agreement with Korea, 79 U.N.T.S. 62 (1951), did, however, accord such exclusive jurisdiction to the Commanding General "over the personnel of his command, both military and civilian, including dependents."

³⁴ Article 1 provides that

"In this Agreement the expression

* * * * *

(b) 'civilian component' means the civilian persons of United States

to the "civilian component" apparently extends to a larger class, but technically does not include dependents. The revised Leased Bases Agreement takes a different approach. It does not refer to persons "accompanying," "serving with" or "employed by" the armed forces. Rather it accords a special status to "a person subject to United States military or naval law," a phrase the reach of which has been much restricted by the recent decisions of the Supreme Court referred to above. Also, the status of those "subject to United States military or naval law" is not the same as that of a member of the armed forces. Under the Philippines Agreement, the concept of the civilian component and of dependents, as such, disappears altogether. Persons in those classes nevertheless are protected in a sense, in that the United States has exclusive jurisdiction with respect to all "on-base" offenses, by whomever committed. Outside a base, however, only members of the armed forces have an immunity of any kind. Finally, under the Agreement with Saudi Arabia, no persons other than "American military personnel," distinguished elsewhere in the Agreement from "civilian employees of the Mission" and "their dependents," have any immunity.

More interesting than these variations with respect to the composition of the civilian component and the inclusion of dependents in or their exclusion from those protected by a treaty are provisions excluding from either group those closely related to the receiving state.

The revised Leased Bases Agreement excludes from those given immunity as persons "subject to United States military or naval law" one who is "a British subject or local alien" (Art. IV(1)(c)) but "local alien" is defined (paragraph (9)(b)) to exclude "a national of the United States who is ordinarily resident in the Territory." This Agreement is thus more favorable to the

nationality who are in the employ of, serving with, or accompanying, the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan. * * * For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals."

See *United States v. Robertson*, 5 U.S.C.M.A. 806, 19 C.M.R. 102 (1955) for an elaborate review of the meaning of "civilian component" under the prior Administrative Agreement with Japan under Article III of the Security Treaty. Feb. 28, 1952, 3 UST 3341, TIAS 2492.

sending state than the NATO Agreement, in that it does not exclude from the "civilian component" either stateless persons and nationals of non-NATO states, or United States nationals ordinarily resident in the receiving state. The Agreement with Japan, on the other hand, is less favorable to the sending state than the NATO Agreement. Membership in the "civilian component" is subject to the affirmative requirement of United States nationality, and even United States nationals are excluded if they are "ordinarily resident in Japan." The Administrative Agreement is unusual also in that it expressly deals with the case of dual nationality; one who has both United States and Japanese nationality is considered as a United States national if "brought to Japan by the United States."

The United States-Ethiopian Agreement protects members of the armed forces, the civilian component (broadly defined) and dependents, but apparently excludes from the first two classes (but not from the third class, dependents) "indigenous Ethiopian nationals and other persons ordinarily resident in Ethiopian territory," apparently including United States nationals.³⁵

³⁵ The Convention with West Germany was even more complicated. It excepted from both members of the forces and the civilian component, those who were nationals neither of one of the Three Powers nor of another Sending State "and have been engaged in the Federal territory." The Convention then added dependents to the class of "Members of the Forces," and finally incorporated a general limitation, i.e., "The definition 'members of the Forces' shall include Germans only if they enlisted or were inducted into, or were employed by, the armed Forces of the Power concerned in the territory of that Power and at that time either had their permanent place of residence there or had been resident there for at least a year." This clause thus appeared (1) to exclude from the protected class even some members of the armed forces; (2) further to limit those in the civilian component entitled to immunity; but (3) not to limit dependents, who hardly either "enlist" or are "inducted into" or are "employed by" the armed forces.

The ideas which have found some recognition in the agreements may be catalogued as follows:

Civilians who accompany the armed forces have a relationship to the sending state which justifies according them the agreed immunities, but such immunities may nevertheless be denied to those who:

- (1) are not, strictly speaking, employed by the armed forces (e.g., the NATO Agreement), or
- (2) are not nationals of the sending state (e.g., the Agreement with Japan), or

It seems entirely appropriate that variations of these kinds should appear in the status of forces agreements, since the circumstances which the several agreements govern differ so widely. The dominant theme is that nationality in the receiving state disqualifies one for any immunity. This can be explained both in terms of the interest of the receiving state in continuing to control the conduct of its nationals and in protecting its nationals from the control of another state. Nationals of third states give rise to a distinct problem; if they are disqualified, it is presumably because the receiving state feels its interest in controlling their conduct while on its territory is superior to that of the sending state, based on the employment relationship alone, unsupported by the tie of nationality. Disqualification on the ground of residence in the receiving state apparently depends on the same factors as disqualification on the ground of nationality in that state, though the receiving state presumably has less interest in controlling and protecting its residents than in controlling and protecting its nationals. The balance between the interests of the sending state and the receiving state becomes even nicer when the individual is both employed by and a national of the sending state but ordinarily resides in the receiving state. The problem is illustrated by the Egyptian case in which a Greek national who had for long years resided in Egypt but enlisted in the Greek forces in Egypt, claimed immunity for an offense which consisted

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- (3) are not nationals at least of one of its allies other than the receiving state (e.g., the NATO Agreement, and see the superseded Convention with West Germany), or
 - (4) are nationals of the receiving state (e.g., the NATO, revised Leased Bases and Ethiopian Agreements), or
 - (5) ordinarily reside in the receiving state (e.g., the NATO and Ethiopian Agreements, the Agreement with Japan), or
 - (6) ordinarily reside in the receiving state and are not nationals of the sending state (e.g., the revised Leased Bases Agreement), or
 - (7) were engaged locally and are not nationals of the sending state or of one of its allies, or were not engaged in the sending state or did not reside there even though they were engaged there and are nationals of the receiving state (the superseded Convention with West Germany).

Dependents may be, but usually are not, accorded the agreed immunities. If they are, an exception may be made for dependents who are nationals of or ordinarily resident in the receiving state (e.g., the Libyan Agreement), but in other instances no such exception has been made (e.g., the Ethiopian Agreement and the superseded Convention with West Germany).

of a series of acts stretching back for years prior to his enlistment.³⁶

It might seem strange that in some agreements neither nationality nor residence in the receiving state disqualifies a dependent, even though it does a member of the civilian component. This distinction is, however, understandable, for it reflects the judgment that family ties provide a stronger link to the sending state and alienate the individual more completely from the receiving state than employment by the sending state. Dependents are likely to live within the foreign military community; local employees are not. Again, dependents will presumably in time become residents and nationals of the sending state; for local employees this is less likely.

THE IMPACT OF REID V. COVERT

The status of forces agreements negotiated prior to *Reid v. Covert*³⁷ were concluded on the assumption that American courts-martial could exercise jurisdiction over civilians accompanying our armed forces abroad. *Reid v. Covert* and the cases³⁸ applying and extending its doctrine have established that they may not—that Article 2 (11) of the Uniform Code of Military Justice,³⁹ in purporting to give such jurisdiction to courts-martial in peacetime, is unconstitutional. What is the effect of those decisions on the jurisdictional arrangements of these agreements?

The possible alternatives to the jurisdiction of courts-martial are (1) trial by a civil court of the United States in the receiving state (2) trial by a civil court of the United States in the United States or (3) trial by the receiving state. Are these permissible, or is any of them mandatory, under the several agreements?

It seems too clear for argument that a civil court of the United States cannot try civilians in any foreign state without the consent of that state. Characteristically, the existing agreements do not include such consent. Rather, the consent is specifically

³⁶ *Stamatopoulos v. Ministère Public*, Mixed Court of Cassation, Egypt, Nov. 23, 1942, [1919-1942] Ann. Dig. (Supp. Vol.) 170 (No. 88).

³⁷ 354 U.S. 1 (1957).

³⁸ *Supra*, note 2.

³⁹ 70A Stat. 37, 10 U.S.C. Sec. 802(11): "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following * * *."

limited to the exercise of jurisdiction by the military authorities of the sending state.⁴⁰ The only agreement which expressly contemplates that United States civil courts might sit in the receiving state are the revised Leased Bases Agreement and the Bahama Islands Agreement.⁴¹ Three other agreements may perhaps be read as consenting to the exercise of jurisdiction by United States civil courts: those with the Philippines,⁴² with Denmark regarding Greenland,⁴³ and the expired agreement with the Dominican

⁴⁰ Article VII of the NATO Agreement provides, in 1 (a), that "the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State"; in 2(a) that "The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State"; in 3(a) that "The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to" certain offenses. Where jurisdiction of the receiving state is concerned the phrase used is, in contrast, "the authorities of the receiving State," not "the military authorities." The Agreement with Japan, and the Defense Agreement with Iceland contain comparable language. The Convention with West Germany, Article 6, stated in 1 that "the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Force." The Agreement with Korea provides that "exclusive jurisdiction over members of the United States Military Establishment in Korea shall be exercised by courts-martial of the United States." The Agreement with Ethiopia provides, in Article XVII, 2 that "The United States military authorities shall have the right to exercise within Ethiopia * * *," and that with Libya contains similar language.

⁴¹ The Bahama Islands Agreement—the revised Leased Bases Agreement is similar—provides in Article V that "(1) the Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in the Bahama Islands * * *", and jurisdiction is allocated in part on the basis of whether "a civil court of the United States is sitting in the Bahama Islands." Significantly, the jurisdiction allocated to the United States is greater if such civil court is sitting.

⁴² Article XIII provides that "The Philippines consents that the United States shall have the right to exercise jurisdiction * * *." Article XIV, 2 refers, however, to "cases where the service courts of the United States have jurisdiction under Article XIII, * * *."

⁴³ Article VIII provides that "The Government of the United States of America shall have the right to exercise exclusive jurisdiction * * *." But the Agreement was, in this respect, subject to being superseded by the NATO Agreement.

Republic.⁴⁴ The first alternative is therefore available, in any but these states, only if appropriate agreements are negotiated. Also, it would require that the United States extend its criminal law to offenses committed by the civilian component and dependents abroad, since they are no longer subject to the Uniform Code of Military Justice.

Whether trial by a civil court in the United States is a permissible alternative is a more complex question. Under the NATO Agreement, since American law does not, in most instances, now extend to offenses abroad, the receiving state now has exclusive jurisdiction over both the civilian component and dependents.⁴⁵

⁴⁴ Article XV (1) provided that "the government of the United States of America shall have the right to exercise exclusive criminal jurisdiction * * *." But Article XV (2) used the language "Whenever military authorities of the United States of America may exercise jurisdiction over an alleged offender * * *." Moreover, the jurisdiction conferred was limited to "Members of the United States Forces" and "[O]thers subject to United States military law * * *."

⁴⁵ "The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences * * * punishable by its law but not by the law of the sending State." Article VII 2(b). The receiving state always had primary jurisdiction over dependents. Article VII, 2(b), in giving the receiving state exclusive jurisdiction for offences not punishable by the law of the sending state, refers to "the law of the sending State," not the "military law" of that state. It can therefore be said that when Article VII, 3 refers to "cases where the right to exercise jurisdiction is concurrent," the meaning is "cases where the right of the military authorities of the sending State and the authorities of the receiving State is concurrent." If it is so read, the subsidiary clauses of Article VII, 3, including (b), which provides that "In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction," can be read as relating only to the allocation of jurisdiction between such authorities. Article VII, 5(a) points the other way, however, toward the conclusion that the NATO Arrangements were intended to cover the whole field. "The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions."

If the argument advanced was accepted, the United States could not, of course, claim that the civilian component and dependents had any immunity from the jurisdiction of the receiving state nor that the United States would have priority to exercise jurisdiction, and in normal course the receiving state would as a practical matter have the first opportunity to do so. Only

If, however, the United States should extend its criminal law to offenses by the civilian component and dependents abroad, the argument is available that it would be free to exercise jurisdiction through trials in the United States. The argument is that the NATO Agreement relates only to jurisdiction to enforce, not to jurisdiction to prescribe, that with respect to jurisdiction to enforce it purports only to allocate jurisdiction between the military authorities of the sending state and the receiving state's authorities; that hence it does not preclude the sending state from exercising jurisdiction over the civilian component and dependents in the manner a state may and normally does over its nationals and others, for offenses committed abroad.

Article VII is in essence confirmatory of the right of the military authorities of the sending state and of the authorities of the receiving state to exercise enforcement jurisdiction in the receiving state. The right of the military authorities is, however, limited to exercising jurisdiction over those "subject to the military law of that State," which for the United States now excludes and for some states always has excluded the civilian component and dependents.

If the argument suggested is not accepted,⁴⁶ or if the United States chooses not so to extend its criminal law, then, under the NATO Agreement the receiving State alone would have jurisdiction over the civilian component, as well as dependents, under existing arrangements.

The situation under other agreements than the NATO Agree-

a waiver by the receiving state would then give the United States priority. If the United States should elect so to extend and enforce its criminal law—in spite of the many obstacles, legal and practical, to effective administration—the negotiation of implementing agreements would seem to be at least advisable.

⁴⁶ It can also be argued that the inability of the United States to exercise jurisdiction by courts-martial, as contemplated in the NATO Agreement, among others, constitutes a waiver under the appropriate provisions of the agreement, giving jurisdiction to the receiving state. See *People v. Acierito*, Philippines, Sup. Ct., Jan. 30, 1953 [1953] Int. L.R. 148, holding that where the United States concluded a Philippine national employed on a piece-work basis by the United States on a base was not subject to court-martial jurisdiction, there was a waiver which entitled the Philippines to exercise jurisdiction under the Agreement. See generally Daniels, "The Legal Basis of German Criminal Jurisdiction over United States Forces Civilians," 3 JAG Bulletin 26 (1961). Cf. *Re Gadois*, France, Court of Appeal of Paris (Chambre des mises en accusation), Dec. 14, 1953, [1953] Int. L.R. 186.

ment may be but is not necessarily the same. The Libyan authorities appear now to have jurisdiction over the civil component and dependents,⁴⁷ although again it would not necessarily be exclusive if the United States saw fit to extend its criminal law to cover offences in Libya. In Ethiopia,⁴⁸ Korea,⁴⁹ and perhaps the Philippines,⁵⁰ on the other hand, a hiatus may exist. This last situation could lead a receiving state to claim that, since the status of forces arrangements were made on the promise, express or implied, that the United States could and would exercise jurisdiction over the civilian component and dependents,⁵¹ its inability to fulfill that duty relieves the receiving state of the obligation to respect the arrangements relating to the civilian component and dependents. The result would appear to be a reversion to the rule of international law in the absence of agreement, i.e., no immunity for the civilian component and dependents, and concurrent jurisdiction.⁵²

⁴⁷ Article XX of the Agreement, (1) and (2), authorize the United States military authorities "to exercise * * * all criminal and disciplinary jurisdiction conferred on them by the laws of the United States of America over members of the United States forces * * * and in every case where such criminal and disciplinary jurisdiction exists, the members of the United States forces shall be immune from the jurisdiction of the Libyan courts," but "in other cases the Libyan courts shall exercise jurisdiction unless the Government of the United Kingdom of Libya waives its right to exercise jurisdiction." Since "such criminal and disciplinary jurisdiction" no longer exists, the immunity no longer exists with respect to the civilian component and dependents.

⁴⁸ Article XVII 3 of the Ethiopian Agreement provides: "Members of the United States forces shall be immune from the criminal jurisdiction of Ethiopian courts * * *."

⁴⁹ The Agreement with Korea provides that "exclusive jurisdiction over members of the United States Military Establishment in Korea will be exercised by courts-martial of the United States." See also Article VIII of the Agreement with Denmark regarding Greenland.

⁵⁰ The Philippines Agreement can be read to give the United States exclusive jurisdiction over "on-base" offenses, but was interpreted by a Philippines court merely to give it primary jurisdiction over such offenses. See *People v. Acierto*, note 46, *supra*.

⁵¹ For example, Article II of the NATO Agreement provides: "It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State * * *. It is also the duty of the sending State to take necessary measures to that end."

⁵² Unless, as may be true under the NATO Agreement, the result is exclusive jurisdiction in the receiving state.

Possibly, in the alternative, it could be said that since these agreements were predicated on a mistake of law⁵³ or, specifically, on a mistake as to the limitations of the American Constitution,⁵⁴ they are, as regards the civilian component and dependents, no longer effective. The result again would be a reversion to the situation under international law in the absence of agreement.

Another possible approach to the whole problem, suggested by the Court,⁵⁵ is to incorporate civilians into the armed forces. The extent to which that could be done appears to be more a question of constitutional law than of international law. The definitions in our agreements are broad enough to suggest some leeway, although there are undoubtedly limits beyond which we could not go without dissent from the receiving state.⁵⁶ The interested Departments have so far, however, rejected this solution.⁵⁷

⁵³ "Writers on international law are in general agreement that errors of law do not have the same juridical effect as is produced by errors of fact, and that international law does not recognize that States may take advantage of their ignorance of the law to free themselves from treaty obligations resulting from such ignorance." Harvard Research, *Law of Treaties*, 29 A.J.I.L. Supp., at 1129 (1935).

⁵⁴ But see 2 Hyde, *International Law*, 1385 (2d ed. 1945). Usually the argument is made by a state which seeks to avoid the consequences of a concession made by it in the treaty. The argument seems much less persuasive when the concession was made to it, and its internal law makes it impossible for it to claim the advantages of the concession.

⁵⁵ *McElroy v. Guagliardo*, 361 U.S. 281, 286 (1960).

⁵⁶ The NATO Agreement, in Art. I, 1(a), defines "force" as "the personnel belonging to the land, sea or air armed services of one Contracting Party." The revised Leased Bases Agreement, in Article IV, 9(c) defines "member of a United States force" as "a member (entitled to wear the uniform) of the naval, military or air forces of the United States of America." Compare *Chow Hung Ching v. The King*, 77 Commw. L.R. (Aust.) 449 (1948).

⁵⁷ "We have examined Mr. Justice Clark's suggestion that overseas civilian employees might be incorporated directly into the armed services, either by compulsory induction or by voluntary enlistment. For a variety of reasons, this proposal was rejected as undesirable and infeasible.

In addition, the following alternatives and combinations thereof are also under consideration:

1. Military status acquired through written agreement or oath to submit to the laws and regulations for the Government and discipline of the Armed Forces.
2. Constitutional amendment.
3. Host nation trials.
4. Domestic trials in Federal district courts.
5. Oversea trials in itinerant Federal district courts.

It should be kept clearly in mind that the decisions of the Supreme Court in no way affect members of the armed forces. Their status remains that accorded to them in the several status of forces agreements or, in the absence of an agreement, that recognized by international law. The status of the civilian component and of dependents accompanying our armed forces has, however, been markedly altered by those decisions. Their status can no longer be determined solely by reference to the relevant agreement, but only by reading the agreement in the light of the decisions. Generally, any immunity accorded them has been nullified, and the civilian component and dependents are subject to

6. Oversea trials in special tribunals convened by the military but consisting of civilian judges and juries.

Each of these involves various problems. The last three present the delicate question whether foreign nations would give their consent to such trials and whether the Congress would, if necessary, agree to reciprocal treatment for crimes committed by foreign civilians in this country. Trials abroad also present problems of impaneling grand and petit juries, subpoenaing foreign witnesses, and establishing staffs of prosecuting attorneys.

Trials in the United States present problems of our authority overseas to arrest offenders, of extradition, and of subpoenaing and transporting foreign witnesses.

In addition to these procedural problems, there are substantive ones as well. At the threshold is the constitutional question whether the Federal Government has the power to legislate concerning common-law crimes committed by American citizens overseas, particularly offenses against foreign nationals.

Assuming that this power exists, should new penal laws be confined to crimes committed "on base"—which is apparently the outer limit of the statutory "maritime and territorial jurisdiction" as defined in 18 U.S.C. 7(3)—assuming that section to be applicable—or extend to all crimes regardless of locus?

Should such laws apply to military employees and dependents, to all Government employees and their dependents, to tourists?

Could distinctions between classes of civilians abroad constitutionally be drawn?

What kind of crimes should be covered—minor as well as major?

What should the penalties be?

Should the District of Columbia Code be incorporated by reference?

If so, should subsequent amendments thereto be automatically extended to offenses abroad; should other Federal district courts be bound to follow the interpretations of the District of Columbia District Court?" Mr. Benjamin Forman, Asst. General Counsel, Department of Defense, Hearings Before the Subcommittee of the Senate Committee on Armed Services, 86th Cong., 2d Sess., June 8, 1960.

the jurisdiction of the receiving state, as they are under international law in the absence of a treaty.

This does not mean, however, that the concepts "the civilian component" and "dependents" are no longer significant. An offense by a member of a force may be an *inter se* offense, over which the sending state has primary jurisdiction, where the victim is a member of the civilian component or a dependent,⁵⁸ as well as where the victim is a member of the force. More important, a member of the civilian component or a dependent is commonly entitled, when tried by the receiving state, to all the rights guaranteed an accused member of a force.⁵⁹ It is most interesting that in the Australian Agreement, negotiated after *Reid v. Covert* and its companion cases⁶⁰ were handed down, both the terms "members of the civilian component" and "dependent" are defined very broadly.⁶¹ It is understandable that a receiving state should be prepared to agree to such broader definitions where the effect of inclusion in a class is not to qualify the receiving state's jurisdiction over the included persons, but the more limited effect noted.

⁵⁸ See Chapter IX, *infra*.

⁵⁹ See Chapter XIII, *infra*.

⁶⁰ Note 2, *supra*.

⁶¹ "Article 1.

In this Agreement, except where the contrary intention appears:

* * *

'members of the civilian component' means civilian personnel in Australia in connection with activities agreed upon by the two Governments who are neither nationals of, nor ordinarily resident in, Australia, but who are:

(a) employed by the United States Forces or by military sales exchanges, commissaries, officers' clubs, enlisted men's clubs or other facilities established for the benefit or welfare of United States personnel and officially recognized by the United States authorities as non-appropriated fund activities; or

(b) serving with an organization which, with the approval of the Australian Government, is accompanying the United States Forces;

'dependent' means a person in Australia who is the spouse of, or other relative who depends for support upon, a member of the United States Forces or of the civilian component."

CHAPTER IX

INTER SE OFFENSES

Certain status of forces treaties, including the NATO Agreement,¹ in allocating jurisdiction, take into account not only the status of the accused but also of the victim, by giving the sending state exclusive or primary jurisdiction over *inter se* offenses. The concept of an *inter se* offense is necessarily dual. The attitude is reflected that if the relationship of both the accused and the victim to the sending state is sufficiently close and to the receiving state sufficiently remote, it is appropriate to give the sending state exclusive or primary jurisdiction.

The place given the concept of the *inter se* offense is not the same in all the agreements. In part, this is because other concepts, such as that of the on-base offense, cut across the field. This may also be because in some agreements the fact that an offense is *inter se* gives the sending state exclusive jurisdiction, rather than only primary jurisdiction. In addition, however, it seems that in different circumstances, different judgments have been made regarding what relationships of the accused and of the victim to the sending and receiving states justify invoking the concept.

The basic issue is whether the relationship of the victim to either state is relevant at all in allocating jurisdiction over an offense. The passive personality principle, according to which jurisdiction may be predicated on the nationality of the victim, never won wide acceptance in international law.² There is, however, a wide difference between asserting jurisdiction solely on the

¹ Article VII 3(a) provides "The military authorities of the sending state shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent."

² *Supra*, page 13.

ground that the victim is a national of the state and taking the nationality of the victim into account as one factor among many in allocating jurisdiction.

The interest of a state in whose territory an offense occurs is in fact influenced by the nationality of the victim. This has not led to any general limitation of the territorial principle. It has, however, been reflected in the accepted rules or in the practice in resolving some jurisdictional conflicts where a state other than the territorial state has a legitimate basis for claiming concurrent jurisdiction. Some states have limited their assertion of jurisdiction under the nationality principle to cases in which the victim was also a national.³ The clearest case, however, of weighing the relative closeness of the victim to the sending and receiving state has been where an offense was committed on a merchant vessel in a foreign port. If the peace of the port is not disturbed and the victim is a fellow member of the crew, then, even though he may be a national of the littoral state, the flag state is, in practice, given primary jurisdiction. Where, however, the victim is a stranger to the vessel (which normally means he is a national of the littoral state) jurisdiction is exercised by the littoral state.⁴ It has been suggested that the same distinction should be made where an offense is committed on a warship in a foreign port.⁵ No such rule has been urged with respect to offenses on shore—all offenses are subject to the jurisdiction of the littoral state, regardless of the relationship of the victim to either state, except, perhaps, on-duty offenses by a member of a warship's crew. But the littoral state has in practice often drawn the same line, waiving its prior claim to jurisdiction where the victim was a fellow member of the crew.⁶ Where both the accused and the victim were members of the crews of warships, the littoral state has waived its jurisdiction, even where the offense was murder.⁷ Where visiting land forces were concerned, the United Kingdom, although it claimed concurrent jurisdiction, normally did not exercise jurisdiction where the victim was also a member of the

³ *Supra*, page 11.

⁴ *Supra*, page 51.

⁵ *Supra*, page 68.

⁶ *Supra*, page 75.

⁷ See the incident cited by Colombos, *op. cit. supra*, p. 74, note 30, at 203-204.

visiting force. There is evidence that this attitude has general support.⁸

This is not to say that the territorial state is interested in exercising jurisdiction only when the victim is its national. There are many policy reasons which prompt states to assert jurisdiction on the territorial principle. One, but only one, is to protect its own nationals by punishing those who injure them or their property. In balancing those reasons against the considerations which support giving at least primary jurisdiction to the sending state over visiting forces, the fact the victim is a member of the visiting force, rather than a national of the receiving state, may, however, tip the scale.

It has been said that to grant exclusive or primary jurisdiction to the sending state over *inter se* offenses constitutes a

⁸ During the debate on the United States of America (Visiting Forces) Act, 1942, Mr. Henderson said: "I can understand the desire of the American Government for exclusive jurisdiction, and of course no question arises so far as that is concerned with their own subjects and with crimes against the person and property of other Americans. But when we come to deal with crimes against British subjects, then at once we enter into a very difficult field, where it is very necessary that we should think out how friction can be avoided and how any feeling that there has been partiality or unfairness can be prevented. * * *" 382 H.C. Deb., (5th ser.) 909 (1942).

In the debate on the Bill to implement the NATO Agreement, several members expressed the same attitude. Thus, Mr. Fletcher said: "I can see a considerable amount of force in the argument that where an offence is committed against a member of a foreign force, in this country, or against the property of a foreign force, it may be well that in those cases the foreign service court should have jurisdiction. But the case is totally different where the offense is committed not against a foreigner or his country but against a British subject. It is that class of case which is really causing the greatest concern among those who are troubled about this Bill. Therefore, I would like to exclude from Clause 3 any offense committed against a British subject, even though it is committed in the course of duty by a member of a foreign force." 505 H.C. Deb. (5th ser.) 1158, (1952). See also the comments of Mr. Stewart, *id.*, at 1161, and of Mr. Strachey, *id.*, at 578 (1952), and the instances cited, *infra*, p. 223, where immunity for offenses committed in performance of duty was objected to because it would apply where the victim was a national of the receiving state.

See, however, *Rex v. Nauratil*, England, High Court, Warwick Assizes, March 11, 1942, [1919-1942] Ann. Dig. (Supp. Vol.) 161 (No. 85), in which Cassels, J. said: "It is said I ought to take into consideration the fact that only Czechoslovak soldiers and citizens are concerned in that matter, which, in fact, arose within the lines of the camp. I cannot say that there is a tremendous force in that argument. * * *"

modern form of extraterritoriality, granted to protect the individual offender rather than his state.⁹ It is submitted that this comes too near to saying that the territorial principle is rooted in, or itself embodies, a single rather than a complex of policy considerations, opposed, where armed forces are concerned, by a single functional basis for overriding the territorial principle and granting immunity. Allocating jurisdiction over visiting forces involves balancing a whole complex of interests of both states. Specifically, it can be said that there is always some basis for according immunity to a member of a visiting force, even for a private act against a stranger to the force. The basis may, in some situations, be compelling; in others, particularly when it is in itself relatively weak, it may be outweighed by conflicting interests of the receiving state. The fact that immunity is denied when the victim is a national of the receiving state does not imply that there is no basis for the immunity, but merely that it is not sufficiently compelling. By the same token, the fact the immunity is granted only when the victim is a member of the military community does not mean the immunity lacks a functional basis. No one would deny that the desire to protect the individuals in its armed forces from the jurisdiction of foreign courts has added vigor to the demands of sending states for immunity. This does not mean it has alone motivated those demands.

⁹ "The other category of offenses as to which the receiving state is denied primary jurisdiction consists of crimes committed by a member of the armed forces against persons forming part of the military community. It is difficult to associate this qualified immunity with the need of protecting the sending state in its sovereign functions. It is true that jurisdiction over these offenses may assist the military authorities of the sending state to maintain discipline, but why should the dividing line between the jurisdiction to maintain discipline be drawn on the basis of the nationality of the victim and the calling he pursues? Candor compels one to admit that this primary jurisdiction over offenses committed against other members of the military community is a modern form of extraterritoriality. * * *

* * * * *

"The concession to the sending state of primary jurisdiction over offenses committed within the military community and, to a much more limited extent, over offenses committed while the individual is in the performance of official duties thus appears to be grounded in a desire to protect the individual, rather than the state." R.R. Baxter, "Jurisdiction Over Visiting Forces and the Development of International Law," 52 *Proceedings Am. Soc'y Int'l L.* 174, 175-176 (1958).

The NATO Agreement gives a measure of immunity to members of the visiting force and to the civilian component but not to dependents. An offense can be *inter se* only if committed by a member of the force or the civilian component. An offense by a member of either group is, however, *inter se* if it is committed against a member of the force or of the civilian component or a dependent. The record is not clear as to why the distinction was made. Possibly there is reflected the desire to protect a member of the visiting force or civilian component but not a dependent. More probably, there was thought to be a persuasive reason for giving primary jurisdiction to the sending state over members of its military forces and civilian components. That reason was thought to be sufficiently compelling when the victim was a dependent, as well as when he was a member of the visiting force or the civilian component, but not strong enough to prevail when he was a stranger to the force. At the same time it was felt—as it consistently could be—that there was never a sufficient basis for giving treaty status to a dependent, regardless of the status of the victim.¹⁰

The revised Leased Bases Agreement and Bahama Islands Agreement are particularly interesting because the phrase used to describe *inter se* offenses is “United States interest offences.”¹¹

¹⁰ It may be urged that if this was the approach of the NATO negotiators, they should, to be consistent, have defined the civilian component in two different ways, eliminating the limitation excluding nationals of the receiving state in defining those members of the civilian component an offense against whom would be within the community, since the limitation does not appear in the definition of dependents, which is relevant only for this purpose. Two answers suggest themselves: (1) The failure to make the distinction may be an accident of draftsmanship of the type that is inevitable in a tightly drafted series of interlocking clauses; (2) A dependent, even though a national of the receiving state, is much more a member of the military community than a member of the civilian component, e.g., an employee of the PX or Naval Exchange, who is a national of the receiving state.

¹¹ Article IV (9) (f) of the revised Leased Bases Agreement reads:

“(f) ‘United States interest offense’ means an offense which (excluding the general interest of the Government of the Territory in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British subject or local alien) or property (not being property of a British subject or local alien) present in the Territory by reason only of service or employment in connexion with the

The phrase is apt in suggesting the motives for the use of the concept. The concept is, however, given a relatively limited place in these agreements, perhaps because jurisdiction is allocated largely with reference to whether an offense was committed on or off a Leased Area or Site and because the agreements do not provide for a primary right to exercise jurisdiction where there is concurrent jurisdiction. It is, however, the basis for according the United States exclusive jurisdiction in two situations. If a state of war does not exist, the United States has exclusive jurisdiction over security offenses and over United States interest offenses committed inside a Leased Area or Site by a member of its forces.¹² This is the only situation in which, in peacetime, the fact that the offense is *inter se* is relevant. If an offense is committed outside a Leased Area or Site by a member of the American forces or anywhere by a member of the civilian component, the allegiance of the victim is irrelevant. If, on the other hand, a state of war exists, the United States has exclusive jurisdiction over members of the American forces for any offense and also is given exclusive jurisdiction over security offenses and United States interest offenses committed within a Leased Area or Site if the accused is "not a member of a United States force, a British subject or a local alien, but is a person subject to United States military or naval law."¹³

These agreements parallel the NATO Agreement in delineating the classes to which an accused must belong before jurisdiction may be claimed by the sending state on the ground the offense was *inter se*, even to excluding members of the civilian component who are nationals of the receiving state. They differ in fixing the classes to which the victim must belong before an offense can be classified as *inter se*, excluding dependents.¹⁴

construction, maintenance, operation or defense of the Bases."

The phrase "British subject" is defined in (a) of the same paragraph to exclude a member of the United States force, but not of the civilian component. See Article V(9)(c) and Article I(6) of the Bahama Islands Agreement.

¹² Article IV(1)(a)(ii) of the Leased Bases Agreement and Article V(1)(a)(ii) of the Bahama Islands Agreement. The Agreement with the Federation of the West Indies is, however, substantially the same as the NATO Agreement. See Article IX(3), and Article I.

¹³ Article IV(1)(c)(i) of the Leased Bases Agreement and Article V(1)(c)(i) of the Bahama Islands Agreement.

¹⁴ Articles cited note 11, *supra*.

One may speculate regarding the reasons for setting the particular limits which define a United States interest offense and prescribe the relevance of the concept in these Agreements. The fact that the United States is given exclusive jurisdiction over on-base offenses by a member of the civilian component if committed against a member of its forces or the civilian component in time of war, but not in time of peace, strongly supports the view that the basis for the immunity is functional, that is, stems from military exigency. A state may be interested in protecting the individuals in its service from the jurisdiction of foreign courts, but it is not likely to be more interested in doing so in time of war than in time of peace. There is, however, a greater functional basis for claiming immunity in time of war.

The Philippines Agreement, to an even greater degree than the revised Leased Bases Agreement, allocates jurisdiction according to whether the offense was committed within or outside a base. The United States has virtually exclusive jurisdiction over all on-base offenses; hence there is no room for the concept of the *inter se* offense. (It is worth reminding oneself at this point, however, that the on-base concept is closely related to the concept of the *inter se* offense.) The Philippines Agreement, nevertheless, exempts from this grant of exclusive jurisdiction to the United States offenses "where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty)." ¹⁵ This clause recognizes partially the interest of the receiving state in punishing those who offend against its citizens—an interest which is more completely recognized in other agreements. The Philippines object to their Agreement precisely because the recognition of this interest is partial, and jurisdiction is not accorded to the Philippines in all cases of private acts against Philippine nationals. It may be the Philippines would not object to an agreement which gave the same recognition to the concept of an *inter se* offense as does the NATO Agreement.

On the other hand, the Philippines Agreement does give a role, though a very limited role, to the concept in allocating jurisdiction over off-base offenses. The United States is given exclusive jurisdiction over "any offense committed outside the bases by any member of the armed forces of the United States in which the

¹⁵ Article XIII, 1 (c).

offended party is also a member of the armed forces of the United States.”¹⁶ The fact that an off-base offense by a member of the armed forces is against a member of the civilian component or a dependent does not give the United States jurisdiction. Neither does the United States have jurisdiction over an off-base offense committed by a member of the civilian component or a dependent against a member of the armed forces or of the civilian component or a dependent.¹⁷

The Agreement with Libya in this respect contrasts markedly with the Philippine Agreement. The United States has exclusive jurisdiction over “members of the United States forces” for “offenses committed solely within the agreed areas” and for “offenses solely against the property of the Government of the United States of America, or against the person or property of another member of the United States forces.”¹⁸ The phrase “United States forces” is, however, defined in such broad terms¹⁹ that an offense by a member of the armed forces or of the civilian component or a dependent against a person in any of these groups (excluding Libyan nationals), wherever committed, falls under American jurisdiction. The situation with respect to on-base offenses, on the other hand, parallels that in the Philippines.²⁰

Reid v. Covert and its companion cases²¹ have not changed the

¹⁶ Article XIII, 1 (b).

¹⁷ The Agreement contemplates that the local fiscal (prosecuting attorney) may waive jurisdiction in these and other cases, in which event the United States is free to exercise jurisdiction. See Article XIII, 4.

¹⁸ Article XX (1) (b) and (a).

¹⁹ “‘United States forces’ includes personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such services (including the dependents of such military and civilian personnel), who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement.” Article XXVIII.

²⁰ The allocation of jurisdiction under the Agreement with the Dominican Republic resembled that under the Libyan Agreement. The United States had exclusive jurisdiction over all offenses committed in the Republic by members of the United States forces and others subject to United States military law, except Dominican nationals or local aliens. The one exception was with respect to offenses committed outside the sites against a Dominican national or local alien; in such cases, the Mixed Military Commission decided who should exercise jurisdiction. Article XV (1) (a) and (b).

²¹ *Supra*, p. 157, note 2.

reach of the concept of the *inter se* offense. It is true that if the accused is not a member of the armed forces, an American court-martial cannot exercise jurisdiction, even though the offense is *inter se*, e.g., by a member of the civilian component against a dependent. If the accused is a member of the armed forces, however, and the victim is either a member of the civilian component or a dependent, the offense is still *inter se* under the NATO Agreement.²² The same is true under the other agreements in which the concept is used. An offense by a member of the armed forces is still *inter se*, even though the victim is of a class over which a United States court-martial can no longer exercise jurisdiction.

The agreements discussed suggest that, while the role assigned the concept of the *inter se* offense has varied, there is general agreement that it has a place in allocating jurisdiction.²³ One should not, however, overestimate the reach of any of the provisions incorporating the concept. A series of acts, or even a single act, against a member of the military community may also offend against a distinct and discernible, if not vital, interest of the receiving state.²⁴ The suggestion has been made²⁵ that, under the NATO Agreement, where the offenses are of roughly equal

²² If the United States had, in the NATO negotiations, succeeded in its effort to have used the combined term, "contingent," defined as those subject to the military laws of the United States, the result of *Reid v. Covert* would have been to narrow the scope of the treaty language.

²³ Some of the agreements, including the NATO Agreement, include in the concept offenses against the property or security of the sending state or against the property as well as the person of a member of the military community. It seems unnecessary to discuss these provisions in detail. If the concept is valid where an offense is against a person, *a fortiori* it is valid where an offense is against the property or the security of the sending state, since the interest of the receiving state in punishing offenses of this nature is presumably less than in punishing offenses against a person.

²⁴ Snee and Pye, *Status of Forces Agreement: Criminal Jurisdiction* 55-7 (1957). The authors cite the *Buxton* case, ACM 8708, 16 CMR 732, in which the accused, a member of the United States forces, stole pistols belonging to the United States and sold them to Moroccans. The French agreed that under the French Moroccan Agreement (classified) the United States had primary jurisdiction with respect to the larceny, but claimed primary jurisdiction over the offense of illegal trafficking in arms. The authors note also that an assault may be considered as a breach of the peace and therefore not solely against the victim, and a sexual offense one against public decency as well as against the person.

²⁵ Snee and Pye, *op. cit. supra*, note 24, at 57.

gravity, each state should exercise jurisdiction over the offense regarding which it has the primary right, but that where one is of distinctly greater gravity, only the state having the primary right with respect to that offense should exercise jurisdiction.

Under the NATO Agreement the fact that an offense is within the military community gives the sending state only primary, not exclusive jurisdiction. The word "primary" presumably means priority in time. The fact that one state has the primary right to exercise jurisdiction hence suspends, rather than eliminates, the concurrent but secondary right of the other state.²⁶ Theoretically, then, recognition of a primary right in one state and its exercise may create a problem under the double jeopardy provision.²⁷ It may be that in this context the approach to the multiple offense problem should be as technically nice as that which normally characterizes the handling of double jeopardy problems. It would, however, seem more in keeping with the spirit of the NATO Agreement to interpret broadly the provision giving primary jurisdiction to the sending state over *inter se* offenses. The receiving state can, after all, later assert its secondary jurisdiction in the unlikely event that the action taken by the sending state is unsatisfactory, and in this case the double jeopardy provision may well not be a bar.

The shape of the problem is somewhat different where the sending state is granted exclusive jurisdiction over *inter se* offenses. A stricter interpretation of what constitutes such an offense may, in this context, be in order. Perhaps drawing a line in terms of the place of the offense—whether on-base or off-base, as the

²⁶ *Labelle v. Zerfoss*, No. 254/1954 (Cour de Cassation, 7 Mar. 1957), affirming *Gadois v. Zerfoss* (Cour d'Appel de Paris, 14 Dec. 1953), 81 *Journal du droit international* 737 (1954), summarized in Snee and Pye, *op. cit. supra*, note 24, at 69–70.

²⁷ In the *Whitley* case (Cour de Cassation, 25 March 1958) which arose when a car being driven by a Major in the USAF was involved in an accident which caused the death of a passenger, a Canadian officer, the court held, reversing the Cour d'Appel de Paris, that where France had waived its primary jurisdiction and the United States authorities had, after a thorough investigation, determined not to try the accused, a joint criminal-civil action by the widow of the victim was barred. It can be argued that the same rule should apply where a state has the primary right to proceed by the Agreement. A waiver is, however, an affirmative act, and the language of Art. VII 3(c) is "If the State having the primary right decides not to exercise jurisdiction," language apt for expressing the idea of final rather than temporary surrender.

Philippines Agreement in effect to a degree does—has real merit. The line need not mark a complete break, completely excluding the utilization of the concept where the offense is off-base. Where, however, the offense is both *inter se* and on-base, it can be looked upon as one within the military community, which is separate enough so that an *inter se* offense committed there does not seriously disturb the “peace of the port.”²⁸ The parenthetical clause in the definition of “United States interest offense” in the revised Leased Bases Agreement, “excluding the general interest of the Government of the Territory in the maintenance of law and order therein” suggests the added interests, other than the protection of the territorial state’s nationals, which lie behind the territorial principle. It is significant that the receiving state was prepared expressly to waive those interests in an agreement which limited the reach of the *inter se* concept to on-base offenses.

The significance accorded the *inter se* concept in status of forces agreements is perhaps surprising in view of the limited significance given to it in the traditional analysis of the bases of jurisdiction. The allocation of jurisdiction over merchant seamen with respect to offenses committed on board ship in a foreign port does, however, provide a precedent. The actual practice of states with respect to offenses by the crews of warships on shore furnishes another. Much comment suggests, moreover, that much greater importance is in fact attached to the status of the victim than to the place of the offense. It may well be that the territorial principle owes much more to the fact that the victim is usually a national of the territorial state than is commonly assumed. In any case, the *inter se* concept seems clearly to be an acceptable basis for according a limited im-

²⁸ A most interesting provision reflecting these ideas is that in Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain. Paragraph 7 reads: “Whenever a member of the United States Forces commits an offense solely against the property of the United States or solely against the property or person of another member of the United States Forces and the offense is committed on a military reservation in an area which is under the control of a United States ‘Commander,’ the offender will, if he is apprehended by Spanish military police, immediately be turned over into the custody of United States military authorities for disciplinary action. No report of the offense will be made to the Mixed Commission or Jurisdiction and the United States ‘Commander’s’ disposition of the case shall be final and binding on all concerned * *.”

munity from the jurisdiction of the receiving state to visiting armed forces.²⁹

²⁹ Section 62 of the Restatement, *Foreign Relations Law*, p. 194, states that "(1) Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory * * * implies that it agrees that the sending state shall have the prior right to exercise enforcement within the territory over members of the force with respect to

* * * * *

(b) an offense committed by a member of the force that affects only the force or its members and does not involve the public order of the territorial state."

See also Comment d to Section 62 at 195.

The position taken seems eminently reasonable, but it may be doubted that there is any established rule to this effect.

CHAPTER X

ON-BASE OFFENSES

The concept of the "base,"¹ although it finds no place in the NATO Agreement, has been widely used in other status of forces agreements. It has a longer history than the *inter se* concept.

Oppenheim² was the most influential among a significant minority of text writers³ who took the position that visiting

¹ The word "base" seems more appropriate under modern conditions than the word "camp," commonly used in earlier discussions. As used here, it is intended to cover areas of all kinds set apart for the exclusive or primary use of the visiting forces.

² His much quoted statement was:

"Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the force or by other authorities of their own State. This rule, however, applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty; it does not apply, if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress not on duty but for recreation and pleasure and then and there commit a crime. The local authorities are in that case competent to punish them." 1 Oppenheim, *International Law* 759 (7th ed., Lauterpacht, 1948).

However, in the latest, eighth edition, the editor notes that this is the view of some only; and that "* * * the view which has the support of the bulk of practice is that in principle members of visiting forces are subject to the criminal jurisdiction of local courts, and that any derogations from that principle require specific agreement of the local State by treaty or otherwise." 1 Oppenheim, *International Law* 848 (8th ed., Lauterpacht, 1955).

Oppenheim's view was expressly rejected by Cassels, J. in *Rex v. Nauratil*, England, High Court, Warwick Assizes, March 11, 1942, upholding British jurisdiction where the defendant was a Czech sergeant, the victim a Czech subject, and the offence occurred in the barrack-room. [1919-1942] Ann. Dig. (Supp. Vol.) 161 (No. 85).

³ "Such a concession should always be considered as an act of comity, and ought to be harmonized with the security and tranquility of the state, in

forces were immune from local criminal jurisdiction with respect to offenses committed within but not outside their quarters or camps. A related position was taken in the Bustamante Code.⁴

In so far as the immunity of visiting forces for on-base offenses was explained through the fiction of extraterritoriality—and with some, including Oppenheim, the fiction appears to have been a

such fashion, always, that the organization of the army and military discipline are not imperiled.

“It is clear that the territorial sovereign implicitly renounces jurisdiction over the places occupied by the army during the time it is quartered there, and that also, in that which concerns military offenses and offenses *de droit commun* committed within the perimeter of the camp, the jurisdiction of the state to which the army belongs should prevail. The reason is that the state exists morally where the military power which represents it is found, and that the concession on the part of the other state implies in fact the temporary suspension of the exercise of jurisdiction over the territory occupied by the army.

“It ought, on the other hand, to be true that persons who belong to the army fall under the jurisdiction of the territorial sovereign, if they committed in isolation, and outside the perimeter where the army is quartered, acts which concern laws of police and territorial security. It is beyond doubt that in this case the territorial sovereign has the right to judge such persons, because it has not abandoned its rights of jurisdiction in that which concerns the individuals who compose the army, *uti singuli*, but in that which concerns the army, *uti universitas*.” 1 Fiore, *Nouveau Droit International Public* 468–469 (Antoine trans., 2d ed., 1885). See also Fiore, *International Law Codified* 220–221 (5th ed., Borchard trans., 1918).

“In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise.” Lawrence, *The Principles of International Law* 225 (7th ed. 1925).

“Article 299 of the Bustamante Code, annexed to the Convention on Private International Law, Final Act of the Sixth International Conference of American States, 1928, at 16, provided: “Nor are the penal laws of a State applicable to offenses committed *en el perimetro de las operaciones militares*, when it authorizes the passage through its territory of an army of another contracting State, save when they have no legal relation with that army.” Barton states, 1954 *Brit. Yb. Int’l L.* 344, that the article was based on Article 140 of a prior draft Code, the work of Pessôa, and approved by a subcommittee of the Committee of Jurists of the Pan-American Union at Rio de Janeiro in 1912, which used the phrase “*en el recinto del campamento*,” rather than “*en el perimetro de las operaciones militares*,” and would have accorded immunity from local jurisdiction with respect to all offenses committed in that area except those committed by one local citizen against another.

factor—it has lost its footing.⁵ Rejection of that fiction in the case of embassies has led to the conclusion that there is no immunity for offenses committed there.⁶ If one accepts the suggestion that embassies and bases are entirely analogous, the conclusion would follow that there was no immunity for on-base offenses. It can be said, however, that military exigency requires granting immunity to an armed force, if not to the individuals who compose it, when it has the character of an organized body of men, and it has that character on a base. The analogy, it can be argued, is much closer to that of the crew of a warship while on board than to the staff of an embassy.⁷ The base may, moreover, constitute a community apart, at least to a degree, from the community of the receiving state.

Advocates of both complete immunity and of no immunity for visiting forces have criticized the intermediate position, granting immunity only for “on-base” offenses. They object that, although immunity for “on-base” offenses may have made sense when visiting forces garrisoned a fortress,⁸ it does not under

⁵ Both Barton, 1954 Brit. Yb. Int'l L. 349, who rejects the fiction, and the U.S. Memorandum, which refers to it with seeming approval as one of the bases for complete immunity, Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part I, 84th Cong., 1st Sess., 417 (1955), point out that a consistent application of the fiction would not result in according immunity only for the acts of visiting forces in their camps. Barton points out that it would logically give immunity to any person who committed an offense in a camp. Both Barton and the Memorandum state it would require according immunity to a soldier wherever he was, on what Barton refers to as a “walking island” theory—a much more dubious proposition.

⁶ “The ground occupied by an embassy is not the territory of the foreign State. * * * The lawfulness or unlawfulness of acts there committed is determined by the territorial sovereign. If an attaché commits an offense within the precincts of an embassy, his immunity from prosecution is not because he has not violated the local law, but rather for the reason that the individual is exempt from prosecution. If a person not so exempt, or whose immunity is waived, similarly commits a crime therein, the territorial sovereign, if it secures custody of the offender, may subject him to prosecution, even though its criminal code normally does not contemplate the punishment of one who commits an offense outside of the national domain.” 2 Hyde, *International Law* 1285–86 (2d ed. 1948).

⁷ *Ministère Public v. Tsoukharis*, Egypt, Mixed Court of Cassation, Feb. 8, 1943, [1943–1945] Ann. Dig. 150 (No. 40); *Chung Chi Cheung v. The King* [1939] A.C. 160 (P.C.). See Fiore, *op. cit. supra*, note 3.

⁸ “This supposed rule of place * * * probably arose out of the garrisoning

modern conditions of total war⁹ and is too vague and indefinite to permit practical application.¹⁰

There is weight to these objections, and in any event Oppenheim's position never achieved such wide acceptance as to give it the status of a rule of international law.¹¹ There is, however, a

of troops in places particularly limited or defined by agreement. These garrisons were admitted for the protection of weak states, or to assure the carrying out of some treaty provisions or other obligation. Of course, in such a case, the military authorities would not have extraterritorial jurisdiction over their forces outside of the area defined, since such forces would not have the consent of the local sovereign to be outside of such area." U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416.

⁹ Barton, 1952 Brit. Yb. Int'l L. 12; King, 36 A.J.I.L. 559 (1942); U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416; Canadian Factum, *id.*, p. 431.

¹⁰ U.S. Memorandum, Hearings on H.J. Res. 309, *op. cit. supra*, note 5, at 416; Canadian Factum, *id.*, at 431. Barton notes the argument, 1954 Brit. Yb. Int'l L. 350, that permission to occupy an area may be considered an implied grant of the exclusive right to exercise jurisdiction over offenses committed within the area by the visiting forces, and concludes "When the grant of an area * * * actually amounts to a lease or an occupation license, there may be strong arguments in favour of the view that the writ of the local sovereign does not run within that area. Agreements relating to the peaceful military occupation of territory would seem to support such arguments. But where the grant of an area for the use of the visiting forces falls short of such a disposition of territory, there would appear to be no justification for concluding that the juridical consequences of an intra-castral offence committed by a member of a visiting force differ from those of any other offence. The absence of this distinction, as a test for determining whether jurisdiction ought to be exercised, from all the jurisdictional agreements concluded during the Second World War, and, of even greater significance, from the multilateral agreements concluded within the last ten years, may, it seems, be acceptable as cogent evidence not only that the differentiation has no place in international law, but also that it has no utility in practice."

That the form employed in making an area available for occupation by visiting forces can be described as a lease or license may not be irrelevant, but other factors more directly related to the interests of the states concerned and to the recognized bases of jurisdiction and of immunities, appear entitled to greater weight.

¹¹ It will be recalled that Oppenheim's position appears largely to have shaped the British attitude in the World War I Anglo-American negotiations, and again in World War II.

The Mixed Courts of Egypt were prepared to recognize an immunity so limited, seemingly influenced in part by the analogy of warships and their crews. See *Manuel v. Ministère Public*, Court of Cassation [1943-1945] Ann. Dig., No. 42; *Suclozav v. Ministère Public*, Journal des Tribunaux Mixtes,

wide gulf between saying that international law does not and should not accord exclusive jurisdiction to a sending state for on-base offenses, and saying that the concept of a base "has no utility in practice." On the contrary, there is much reason for saying that the difference between the situation on and off a base is significant enough to justify a different allocation of jurisdiction over offenses committed on and those committed off a base. The difference need not be between exclusive jurisdiction in the sending state for on-base offenses and in the receiving state for off-base offenses.

The appropriateness of utilizing the concept of a base in allocating jurisdiction has been recognized in a significant number of status of forces agreements. The United States, early in the century, by treaty acquired with respect to the Canal Zone ¹²

August 24-25, 1945, No. 3504, p. 3. Judge Brinton notes that "The claim [of complete immunity] was rejected in favor of the principle which limits exemption to offenses committed within military precincts or while the members of the forces were engaged in the execution of a military duty." "The Egyptian Mixed Courts and Foreign Armed Forces," 40 A.J.I.L. 737, 739 (1946). Barton suggests, 1954 Brit. Yb. Int'l L. 346, that this seeming willingness to recognize the limited immunity may have been prompted by an "assimilation of the camps of the other foreign forces stationed in Egypt" to the British camps, covered by the Anglo-Egyptian Convention of August 26, 1936, U.K.T.S., No. 6 (1937). The Convention provided in Article 5 that "Without prejudice to the fact that British camps are Egyptian territory, the said camps shall be inviolable and shall be subject to the exclusive control and authority of the Appropriate British Authority." The Mixed Court, however, had no difficulty in distinguishing between the status of the forces of other countries and British forces with respect to offenses committed outside camps, and the immunity of the British forces with respect to such offenses stems from the same treaty.

On the other hand, several of the early cases which came before the Mixed Court involved sailors from warships in Egyptian harbors, and the analogy may well have suggested itself. Barton, *supra*, at 347.

Colonel King vigorously criticized the decisions of the Mixed Courts on the ground, among others, that they "applied to land troops a resolution relating only to naval forces." 40 A.J.I.L. 260 (1946).

¹² The Convention of February 26, 1904 with Panama, 2 Malloy, *Treaties*, etc., 1349 (1910), provided in Article III that "The Republic of Panama grants to the United States all the rights, power and authority within the zone * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and water are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

The Convention also granted the United States certain rights outside the

and sites for naval bases in Cuba (Guantanamo Bay)¹³ and Nicaragua,¹⁴ exclusive jurisdiction not only over offenses committed by its forces, but over all offenses committed in the designated areas. None of these agreements contained any express provision regarding offenses committed by American forces outside the designated areas, and it is understood that the United States does not claim exclusive jurisdiction with respect to such offenses.¹⁵

More important, the first of the World War II agreements on jurisdiction, the Anglo-American agreement of March 27, 1941 relating to the Leased Bases, in significant degree made jurisdiction depend on whether the offense occurred within or without a Leased Area. With respect to American troops, and the civilian component, the United States was given primary jurisdiction over security offenses, and offenses within a Leased Area; it had only concurrent jurisdiction over other offenses.¹⁶ When the Leased

Zone, including, in Article VII, the "right and authority * * * for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order," and in Article XXIII the right to use its police and its land and naval forces for the safety and protection of the Canal if it should become necessary. Article XVI contemplated the making of arrangements for delivery to Panama of persons who committed offenses outside the Zone and were found in the Zone.

¹³ The Agreement of February 23, 1903, 1 Malloy, *Treaties, etc.*, 359 (1910) provided in Article III:

"While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas * * * the United States shall exercise complete jurisdiction and control over and within said areas * * *."

The Lease of July 2, 1903, *id.*, at 360, provided in Article 4 for delivery of fugitives from justice charged with crimes or misdemeanors against Cuban law who took refuge within the areas.

¹⁴ See the Canal Convention of August 5, 1914, (Art. 2) 39 Stat. 1661. No base was established pursuant to the rights granted by the treaty.

¹⁵ See the statement of General Hickman, *infra*, page 218, note 13.

¹⁶ Article IV provided in part that in any case in which "(B) A British subject shall be charged with having committed any such [security] offence within a leased area and shall be apprehended therein; or (C) A person other than a British subject shall be charged with having committed an offence of any other nature within a leased area, the United States shall

Bases agreement was revised in 1950, whether an offense occurred within or without a leased area was again taken into account in allocating jurisdiction.¹⁷

have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence.”

The phrase “A person other than a British subject” included a member of the American forces, and since the agreement did not expressly state who should have jurisdiction over offenses off a leased area, the implication was clear that jurisdiction over such offenses was to be concurrent.

Another World War II agreement, that of March 31, 1942 with Liberia, 23 UNTS 302 (1948–49), gave the United States exclusive jurisdiction over offenses committed by others than Liberian nationals on the airports and other defense areas established in Liberia. It also granted exclusive jurisdiction to the United States over United States military and civilian personnel and their families for offenses outside the defense areas.

Article 2 provided:

“The Republic of Liberia retains sovereignty over all such airports, fortifications and other defense areas as may be established under the rights above granted. The Government of the United States during the life of this Agreement shall have exclusive jurisdiction over any such airports and defense areas in Liberia and over the military and civilian personnel of the Government of the United States and their families within the airports, fortifications and other defense areas, as well as over all other persons within such areas except Liberian citizens.

“It is understood, however, that the Government of the United States may turn over to the Liberian authorities for trial and punishment any person committing an offense in such defense areas. And the Liberian authorities will turn over to the United States authorities for trial and punishment any of the United States military or civilian personnel and their families who may commit offenses outside such defense areas. The Liberian authorities and the United States authorities will take adequate measures to insure the prosecution and punishment in cases of conviction of all such offenders, it being understood that the relevant evidence shall be furnished reciprocally to the two authorities.”

¹⁷ The United States is by Article IV (1) given:

- “(a) Where the accused is a member of a United States force,
* * * * *
- (ii) if a state of war does not exist, exclusive jurisdiction over security offences wherever committed and United States interest offenses committed inside the Leased Areas; concurrent jurisdiction over all other offenses wherever committed.
* * * * *
- (c) Where the accused is not a member of a United States force, a British subject or a local alien, but is a person subject to United States military or naval law,
* * * * *
- (ii) if a state of war does not exist and there is no civil court of the

The Agreement of March 17, 1947 with the Philippines gives the United States the right to use certain bases in the Philippines. The provisions of the Agreement on jurisdiction¹⁸ give much greater reach to the on-base concept than the revised Leased Bases Agreements. The United States has jurisdiction¹⁹ over all offenses committed on a base, by and against whomever they may be committed "except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines." United States jurisdiction, in other words, reaches beyond the furthest point to which the *inter se* concept can carry—an offense by a member of the armed forces, the civilian component or a dependent against a person in any of those groups—to include both an offense by a person in any of those groups against a stranger to the American forces, including a Philippine citizen, whether committed in the

United States sitting in the Territory, exclusive jurisdiction over security offenses which are not punishable under the law of the Territory, concurrent jurisdiction over all other offenses committed inside the Leased Areas."

Other provisions, e.g., Article IV (1)(b), (1)(c), iii, 1(d), as well as those relating to jurisdiction in time of war also distinguish between offenses committed within and without a leased area.

The Agreement relating to the Bahama Islands Long Range Proving Ground, contains almost identical provisions.

The Leased Bases Agreement was modified by an Exchange of Notes of February 13, 1952 and March 14, 1952 between the United States and Canada, 3 UST 4271 (1952), with respect to the bases in Newfoundland. Subsequently, by an Exchange of Notes of April 28, 1952 and April 30, 1952 between the United States and Canada, 5 UST 2139, TIAS 3074, 235 U.N.T.S. 270 (1956), it was agreed that the NATO Status of Forces Agreement should be made applicable to all United States forces in Canada, the United States Note stating that "Both the United States Government and the Canadian Government agree that uniform treatment of United States forces throughout Canada under the NATO Status of Forces Agreement would be in the interest of both countries and would make for simplification of administration.

¹⁸ Article XIII. The United States personnel employed in the military assistance program in the Philippines under the Agreement of March 21, 1947 for military assistance, 45 U.N.T.S. 47 (1949-50) and 70 U.N.T.S. 280 (1950) are by an Exchange of Notes of February 24, March 11 and 13, 1950, 82 U.N.T.S. 332 (1951), given "the privileges and immunities accorded to accredited United States personnel of that Embassy."

¹⁹ Interpreted, in *People v. Acierto*, Philippines, Sup. Ct., Jan. 30, 1953, Int. L. Rep. 1953, 148 as only "prior or preferential but not exclusive."

performance of duty or not and, nominally, by a stranger to the American forces, including a Philippine citizen, against a person in any of those groups.

The jurisdiction of the United States with respect to off-base offenses is, on the other hand, very limited.²⁰ It embraces only (1) the narrowest range of *inter se* offenses, i.e., those in which both the offender and the victim are members of the armed forces; (2) security offenses; and (3) offenses committed by a member of the armed forces (not the civilian component) "while engaged in the actual performance of a specific military duty."

There has been much objection on the Philippine side to the provisions regarding jurisdiction over on-base offenses. Negotiations for the revision of the Agreement have been going on intermittently since 1956. A resolution of the Philippine Senate in March 1959 asked for Philippine jurisdiction over all cases arising on the bases, but recognized there might be justifiable exceptions.²¹ It may be assumed that the Philippines' concern is primarily due to the fact that the United States has exclusive jurisdiction over off-duty offenses by Americans against Philippine citizens, and, nominally, over offenses by others than Americans, committed on the bases. It was reported that the United States was prepared to accede to the Philippines' position on these points, but a second issue—who should determine whether an offense was committed in the performance of duty—was not resolved.²²

The Agreement with the Dominican Republic of November 26, 1951, which related to the Long Range Proving Ground, resembled the Philippines Agreement in its allocation of jurisdic-

²⁰ The Agreement contemplates that the local fiscal (prosecuting attorney) may waive the jurisdiction reserved to the Philippines "over all other offenses committed outside the bases by any member of the armed forces," and if he does so the United States is free to exercise jurisdiction. Article XIII, 4.

²¹ The resolution, as published in the Manila press on March 22, 1959, asked in part for:

"2. Application of the laws of the Philippines in the military bases.

"3. Jurisdiction of Philippine courts over all cases arising in the military bases, including criminal offenses committed by military personnel in violation of Philippine laws, and if justifiable exceptions are recognized, the final determination of whether a particular case is within the exception must rest in Philippine authorities."

²² *The New York Times*, May 10, 1959, p. 25, col. 3.

tion with respect to on-base offenses.²³ The exclusive jurisdiction granted the United States was narrower in that it extended only to those subject to United States military law, but when one subject to that law committed an offense on a Site, the nationality of the victim and whether the offense was committed in the performance of duty were irrelevant. The exclusive jurisdiction granted the United States over off-base offenses was, however, much more extensive than under the Philippines Agreement. It had such jurisdiction except where the victim was a Dominican national or local alien; in the excepted cases, the Mixed Military Commission decided who should exercise jurisdiction.

The Agreement with Libya of September 9, 1954 is like the Dominican Agreement in that exclusive American jurisdiction is limited to "members of the United States forces" but with respect to such persons extends to all offenses "committed solely within the agreed areas." With respect to jurisdiction over off-base offenses the Libyan Agreement is in form like the Philippines Agreement. The term "members of the United States forces" is, however, so broadly defined that every *inter se* offense, in the widest connotation of that term, and every offense committed by any American in the performance of duty is subject to the exclusive jurisdiction of the United States. In substance, therefore, the Libyan Agreement more nearly parallels the Dominican Agreement with respect to off-base offenses also.

The Agreement with Saudi Arabia concerning the Dhahran Airfield²⁴ comes nearest to allocating jurisdiction entirely in terms of the place of the offense. It grants the United States exclusive jurisdiction over offenses committed by United States military personnel (narrowly defined) within a prescribed area; Saudi Arabia has concurrent jurisdiction over offenses committed outside that area. The Agreement is unusual, however, in that the prescribed area includes not only the base but also certain described areas outside the base. It is understood that these areas comprise all those to which United States military personnel may properly go, and no American soldier has ever been tried by a Saudi Arabian court.

The Agreements cited which assign some role to the concept of a base in allocating jurisdiction by no means give it the same role.

²³ Article XV.

²⁴ Par. 13, Exchange of Notes Between the United States and Saudi Arabia Concerning an Air Base at Dhahran, June 18, 1951. 2 UST 1466; TIAS 2290.

One would not expect they would, and the variations do not indicate that the concept has no proper role in allocating jurisdiction.

The term "base" has no single meaning, and many factors are relevant to the issue of whether, in any particular instance, a different allocation of jurisdiction over on-base and off-base offenses is appropriate. The base may be a naval base, an air base, a military headquarters or a housing area. The commander of the visiting forces may be in sole command on the base, or share command with an officer of the local forces. The visiting forces alone may occupy the base, or share it with a contingent of the local forces. The base may be physically separate from the surrounding area—even remote from any other inhabited area—or a building or only a part of a building in a city. Facilities may be built and the visiting forces supplied largely with materials and supplies brought from abroad, or the base may draw heavily on the local economy. Many, few or even no local inhabitants may be employed on the base. Likenesses or differences in language, culture, race and religion, physical proximity and the availability of transportation facilities may encourage or discourage intermingling of the visiting forces and the local inhabitants. Many combinations of these factors can so set the base apart from the surrounding area as to justify a different treatment of the problem of criminal jurisdiction on and off the base.

The above suggests, therefore, that a base—particularly one of the character of a naval or air base—is an integrated unit, an instrumentality of the sending state, manned by an organized body of men, engaged in a common, coordinated effort, analogous to a warship. It can be said, then, that any exercise of jurisdiction by the local authorities within a base, or with respect to acts which occur within a base by those who man it, will in some degree interfere with the effective operation of the base. There is, then, a functional reason, more compelling than can be invoked with respect to offenses committed by a member of the armed forces when he is not on a base, for according the sending state exclusive jurisdiction over on-base offenses.

The soundness of this approach can be better judged if one bears in mind that the concept of a base is material in other contexts. Also involved are such matters as the control of land, sea and air traffic to and in the area, control over the importa-

tion, sale and taxation of goods and materials, immigration, the applicability of local labor laws and many other matters which likewise bear on the effective operation of the base.

Additionally, it can be said that those who man a base, particularly if they are also housed there, constitute a more or less separate community, and offenses within that community do not disturb the "peace of the port." It is useful in this regard to bear in mind the reasons of policy, rather than abstract principle, discussed in the first chapter, which support the territorial principle. Broadly, they relate to the responsibility of the state for the welfare of those within its borders. To the extent that a base is a community apart, the responsibility and correlative concern of the receiving state is in fact diminished and that of the sending state increased. This in no way implies that the receiving state is not "sovereign" in the base area. The reference is to a sociological and not a political fact.

It may be said that this simply restates the problem of the *inter se* offense, and there is no occasion to complicate that problem by bringing in the matter of the place of the offense. It is submitted that the two concepts are, rather, correlative. There is a difference between an altercation between two members of a visiting force on a base, and between the same two men in a local pub. There is also a difference between an altercation between a member of a visiting force and a non-member on a base, and between the same two men in a local pub. The *inter se* concept covers the first pair of these situations; if the offense is committed on base, the on-base concept reinforces the *inter se* concept.²⁵ This concept does not cover the second pair of situations, but it can still be argued that if the accused is a member of the visiting force and the offense is committed on base, the sending state should have jurisdiction, even though the victim is not a member of the force and, presumably, is a national of the receiving state. Nothing in *Reid v. Covert*²⁶ affects this situation, if the accused is a member of the armed forces rather than of the civilian component or a dependent. If, however, the accused is a non-member of the armed forces and particularly if he is also

²⁵ It is with respect to offences which are both *inter se* and on base that the United States is given exclusive jurisdiction under Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain, Paragraph 7, quoted *supra* p. 195, note 28.

²⁶ *Supra*, p. 157, note 2.

a national of the receiving state, the argument for allocating jurisdiction to the sending state merely because the offense occurred on base becomes very weak indeed, even if the victim was a member of the force. It also seems clear that a United States court-martial could not in any event try the accused. *Reid v. Covert* and its companion cases all arose under Article 2 (11) of the Uniform Code of Military Justice. Article 2 (12) makes subject to the Code "persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned * * *." ²⁷ If a United States court-martial cannot try a member of the civilian component or a dependent, it can hardly try an alien who is neither. Nor would the fact that the offense occurred on a base appear to make a material difference. Such an extension of the *Insular Cases* ²⁸ is not to be anticipated.

The significance of the on-base concept for other purposes than those discussed here, e.g., on the right to exercise the power to police, will be taken up in a later chapter.

²⁷ 70A Stat. 37, 10 U.S.C.A. 802.

²⁸ 1 Willoughby, *The Constitutional Law of the United States*, c. xxxi (2d ed., 1929).

CHAPTER XI

DUTY-CONNECTED OFFENSES

Duty-connected offenses are commonly classified into two general categories, those committed in the performance of duty and those committed while on duty but not in the performance of duty. The line between the two categories is more than a little blurred, and classifying a particular case as falling within one category or the other can be very difficult. Broadly speaking the distinction is, however, real enough, and the policy considerations relevant to the allocation of jurisdiction between sending and receiving states are quite different for the two categories of cases.

Immunity for offenses committed in the performance of duty is the most soundly based of all immunities claimed for visiting forces.¹ Its recognition has none the less met with vigorous resistance and, in individual cases, provoked controversies disruptive of orderly international relations.

The Act of State doctrine does not, it is submitted, justify an

¹ “[T]he only immunity which a member of the United States forces abroad could reasonably expect to obtain in the absence of agreement is for offenses which he might have committed in the line of duty * * *.” Attorney General Brownell, Supp. Hearings Before Senate Committee on Foreign Relations On Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty, 83d Cong., 1st Sess., 73 (1953).

Section 62 of the Restatement, *Foreign Relations Law*, p. 194, states: “(1) Except as otherwise expressly indicated by the territorial state, its consenting to the presence of a foreign force within its territory * * * implies that it agrees that the sending state shall have the prior right to exercise enforcement jurisdiction within the territory over members of the force with respect to

(a) An offense committed by a member of the force in the performance of duty * * *.”

It should be noted that the Section speaks in terms of primary and secondary jurisdiction, and not of complete immunity. Comment b on Subsection (1) sets forth at 194–195, the reason of policy supporting the position taken: “The exercise of primary jurisdiction by the territorial state over members of a force in such cases would interfere with the mission of the force and the effective maintenance of its discipline.”

absolute immunity since the act is done in the territory of the receiving state. That doctrine, since it derives from an abstract principle, is equally applicable to any representative of a state, however trivial his duties. Invoking so sweeping an immunity cannot be justified in every instance where the representative performs his duties in another state.² There may nevertheless be a sound functional basis for the immunity of members of the armed forces for acts in the performance of duty.³ Exercising criminal jurisdiction over one who acts for a foreign state is intended to and can prevent him from acting. There is, then, a direct interference with the conduct of the affairs and the advancement of the interests of a foreign state. If, in the specific instance, those interests are of sufficient moment—and where its armed forces are involved there is much reason to say this is always true—there is a strong case for according the immunity. Moreover, the member of the armed forces is placed in a dilemma: to act is to violate the law of the receiving state, not to act is to violate the military law of the state he serves. Superior orders may not be a defense when the act ordered is a violation of international law, but fairness suggests that it should be a defense where only the law of the receiving state is violated. This last argument loses some of its force, however, from the fact that superior orders is

² *Supra*, pp. 32–41.

³ "If we were to examine the immunity of visiting forces in light of the general course taken by the law of immunities, we would be compelled to conclude that the immunity which is accorded to members of the armed forces as to offenses arising out of conduct in performance of official duty is likewise based, in part at least, upon the functional principle. The concession of primary jurisdiction to the sending state is, in this aspect, a derivative of the sovereign immunity enjoyed by the state itself and has as its purpose the protection of the state against possible interference with its activities through the exercise of jurisdiction over those persons who serve it. The other function of the granting of primary jurisdiction to the sending state is to permit it to maintain discipline amongst those who are performing duties in its behalf. In these two respects, the immunity accorded by the Agreement is not for the protection of the individual but for the protection of his government. This explanation is not, however, wholly satisfactory in that a further reason for this right of jurisdiction in the sending state is that it would be unfair to the individual to expose him to criminal prosecution by the receiving state for an act he had been ordered to perform by one acting on behalf of his own Government." R.R. Baxter, "Jurisdiction over Visiting Forces and the Development of International Law," 52 *Am. Soc'y. Int. L. Proc.* 174, 175 (1958).

not generally a defense when pleaded by a member of the American⁴ or British⁵ armed forces accused of violating American or British law, respectively.

Cases relating to the immunity of members of a visiting armed force for acts done in the performance of official duty are sparse and inconclusive. The famous case of *People v. McLeod*⁶ denies immunity. McLeod was tried in New York for murder for his participation in the invasion of the United States by Canadian forces and their attack upon the *Caroline*, a vessel belonging to insurgents against the Canadian government. The decision was disavowed by the United States⁷ and has been much criticized on the ground that what the defendant did, since it was in the course of actual military operations, was legal under the laws of war. Other American cases upholding immunity have relied on

⁴ See Ehrenzweig, *Soldiers' Liability for Wrongs Committed on Duty*, 30 Cornell Law Quarterly 179, 201 (1944). The writer's conclusion is:—

“The common law of military liability is applicable to members of the armed forces of the United States and to those militiamen whose states have not enacted immunity statutes. Older authorities rarely deviated from the stringent principle of full liability for illegal acts, with regard to either civil or criminal liability, whether such acts were committed under order or voluntarily, under ordinary conditions, or in emergencies. A more recent tendency seems to develop a rule of immunity for acts committed in good faith * * *. In derogation of the common law rule the militia statutes of most states have completely or partly immunized members of the militia for acts performed on duty.”

See also Roberts, *Some Observations on the Case of Private Wadsworth*, 51 Am. L. Reg. 63, 161 (1903).

⁵ *Kenny's Outlines of Criminal Law* 54 (Turner's ed., 1952).

⁶ 1 Hill 377, 25 Wend 483 (1841).

⁷ The British minister asked McLeod's release on the ground the destruction of the *Caroline* was a “public act of persons in Her Majesty's service, obeying the order of their superior authorities” which could “only be the subject of discussion between the two national Governments” and “could not justly be made the ground of legal proceedings in the United States against the persons concerned.” Webster said in this case “That an individual, forming part of a public force, and acting under the authority of his Government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law * * *.” Webster, Secretary of State, to Mr. Crittenden, Attorney General, March 15, 1841, 2 Moore, *International Law Digest* 24, *et seq.* (1906). For comment on the *McLeod* case, see 1 Hyde, *International Law* 821 (1922); Jennings, *The Caroline and McLeod Cases*, 32 A.J.I.L. 82 (1939); Moore, *Act of State in English Law*, 126, *et seq.* Compare *In re B.P.Z.S. and others*, Court of Justice, Netherlands New Guinea, March 9, 1955, [1955] Int'l. L. Rep. 208.

this ground,⁸ and *Horn v. Mitchell* can be read as meaning that this is the proper dividing line.⁹ British text-writers have accepted the limitation on the Act of State doctrine of *Regina v. Lesley*¹⁰ and suggested that, with respect to members of the

⁸ In *Arce v. State*, 83 Tex. Cr. R. 292, 202 S.W. 951 (1918), after General Pershing invaded Mexico, a force organized at Monterey by direction of the Carranza *de facto* government invaded Texas and fought a battle with two companies of American cavalry. Several were killed on both sides. Four Mexicans were captured and tried and convicted of murder. On appeal the court held that a state of war existed; that if any authority to punish the defendants existed, it was in the federal, not the state government; and that if the state court had jurisdiction, the conviction was erroneous because the command was organized under the authority of the *de facto* government and the troops were required to obey the orders of their superior officers.

In *Straughan's Case*, 1 Ct. of Claims Reports 324 (1863-1865), *The Chesapeake*, upon leaving Hampton Roads, was intercepted by a British squadron, which demanded permission to search *The Chesapeake* for deserters. The demand was refused and the British squadron opened fire. *The Chesapeake* struck its colors and the British removed from *The Chesapeake* several seamen, including the husband of the claimant. The claim was for wages during the period of detention by the British under a statute the crucial clause of which referred to those "taken by an enemy." The British government had disavowed the act of the admiral commanding the squadron and offered payment for the injury to the seized seamen.

A dictum of the court stated, at 328: "The acts of a naval commander, so far as other nations are concerned, are the acts of his government. His government is responsible for them, must answer for them, and must atone for them. There is no book or decision which calls such acts a private wrong, and the officer a wrongdoer. * * * Neither the United States nor the injured seaman could have prosecuted the captain and crew of the *Leopard* in criminal tribunals, nor have recovered damages from them in courts of law."

⁹ 232 Fed. 819 (CCA 1, 1916). The rationale of the court's holding appears, however, to be that there was insufficient evidence that petitioner's acts were authorized by the German government; that a commission as first lieutenant of the Landwehr (second reserve) Pioneers, dated August 18, 1908, was inadequate in this regard. There is a suggestion also that for immunity to exist the act must be "specifically authorized or avowed" by the government.

¹⁰ 26 *Halsbury's Laws of England* 253 (2nd ed. 1937), states that "The official acts of every state or potentate * * * and of their authorized agents, are acts of State. No action can be brought in respect of such acts, even when the agent is a British subject, and, in carrying out the act of State, is committing an offence against English law." A footnote states, however: "It is doubtful whether this rule applies to acts committed in British territory by order of a foreign sovereign. There appears to be no direct English

armed forces, immunity for acts in the performance of duty extends only to the "public and open employment of force" recognized by international law as "lawful in case of actual war."¹¹

authority on the point (see, however, 1 Hale, P.C. 99), but in *The People v. McLeod* (1841), 1 Hill 377, the Supreme Court of New York held that the plea of 'act of State' afforded no defense to a British subject who committed a criminal act in American territory. This decision was the subject of much comment, chiefly extra-judicial; Lord Lyndhurst, L. C., is said to have agreed with it * * * but the Governments of this country, and the United States expressed a contrary view * * *. *R. v. Lesley*, *supra*, to some extent supports it * * *."

Dicey's *Conflict of Laws*, 164 (7th ed. 1958), states that "As regards acts of State authorized by foreign Governments * * * the courts in England would doubtless apply the same principle, at least in respect of acts committed outside England." A footnote states that "The position with regard to acts within the jurisdiction is uncertain; the Supreme Court of New York has held that in such circumstances a plea of act of State will not lie: *The People v. McLeod* (1841) 1 Hill 377. See *R. v. Lesley* (1860) 8 Cox C.C. 269, which appears to be in the same sense."

¹¹ "The case for immunity has never been put higher than the public and open employment of force, and there the legitimate limits of act of States in this connection may lie. Perhaps a further limitation must be added—that the acts themselves must be of a kind which international law recognizes as lawful in case of actual war. It has been pointed out that English Courts certainly do not 'admit to its full extent the principle that we cannot subject to our municipal laws aliens who violate such laws under the direction of their sovereign.'" Moore, *Act of State in English Law* 131 (1906).

The same author, in reviewing the factors to be taken into account in determining what is "matter of State," says "Secondly, there is the *authority* under which the acts are done, and the *nature of the acts themselves*—whether the authority of the sovereign is the one thing needed, or whether that authority confers immunity only upon such acts as are of an obviously public character, and are lawful as between independent states; and whether, apart from authority given by a lawful sovereign, some acts are so essentially public in themselves as to be outside municipal jurisdiction. Thirdly, the *place* in which the acts are done may be material—whether in our own territory, or on the high seas, or in the territory of some foreign sovereign."

Compare the statement of the Attorney-General, Sir Hartley Shawcross, in the House of Commons, March 10, 1948, quoted in 1 McNair, *International Law Opinions* 115 (1956), with reference to the status of British forces in Palestine after the termination of the mandate: "It is the existing law that, where an action is brought by a foreign subject in respect of acts done by British soldiers or officials on foreign territory, which were done on behalf of the Government, or adopted by the Government after they were done, the defence of Act of State is a complete bar to any claim for damages that may be made. It also is the existing law, as a matter of in-

A general immunity for acts in the performance of duty, rather than one so limited, has, on the other hand, been recognized by the Supreme Court of Panama in *Republic of Panama v. Schwartzfiger*¹² and the Supreme Federal Court of Brazil in *In*

ternational law, that, where we have Forces in occupation of foreign territory, it is recognized that they are entitled to do that which is necessary for their own safety and protection, and that what they do in the course of these duties on foreign territory is not justiciable in the courts of this country or of any other country."

See also *Amrane v. John*, Civil Tribunal of Alexandria, Egypt, Jan. 14, 1932, [1931-1932], Ann. Dig. 174 (No. 90).

¹² 24 Panama, Registro Judicial 772 (1926), 21 A.J.I.L. 182 (1927). A workman at France Field, in the Zone, was severely injured. Schwartzfiger was ordered to rush the injured man to Colon Hospital in an ambulance. The ambulance, while being driven across Colon at a speed in excess of the legal limit, struck a business establishment and killed a man. The Supreme Court concluded the Panama courts had no jurisdiction.

The case has been cited as holding that under international law visiting forces enjoy complete immunity from the jurisdiction of a country in which they are stationed. It seems clear, however, that the Supreme Court (1) considered that Panama was obligated by treaty to accord immunity to the accused, (2) viewed the case as involving troops in passage rather than stationed in the country and (3) adopted the view of the Procurador General that the fact that the accused was acting in discharge of his duty in driving the ambulance was crucial. Only in the opinion of the Procurador General is a general immunity of troops stationed in a country mentioned, and then only in a general discussion of the authorities.

Assistant Attorney General Rankin commented regarding the wider interpretation sometimes given the *Schwartzfiger* and *Gilbert* cases:

"The cases thus stand for the proposition that the only defense of immunity which has received sufficient recognition to be accorded any weight is where the offense occurred in the line of duty. They accord with the opinions of two of the most eminent international law authorities, Lawrence and Oppenheim who expressly limit the immunity to offenses committed in the line of duty or within the lines of the visiting forces (Lawrence, *Principles of International Law* (6th ed.) Sec. 107, p. 246; Oppenheim, 1 *International Law* (4th ed.) Sec. 445)." Hearings Before the House Committee on Foreign Affairs, On H.J. Res. 309, Part 1, 84th Cong., 1st Sess. 266-67 (1955).

The *Schwartzfiger* case has not led in practice to the grant of a general immunity for American forces in Panama.

"Pursuant to an informal agreement in 1943 between our military authorities and the commandant of the Panamanian National Police, military personnel who commit offenses within the Republic and who are apprehended by the Panamanian authorities are frequently turned over to the United States authorities for disciplinary action. Local authorities, our authorities there, state that Panamanian authorities rarely refuse to re-

re Gilbert.¹³

linquish their primary jurisdiction when requested to do so." General Hickman, Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess., 38 (1955). But in the period from Dec. 1, 1958 to Nov. 30, 1959 Panama waived its jurisdiction in only 20 of 167 cases. Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 86th Cong., 2d Sess., (1960) 24.

¹³ Brazil, Supreme Federal Court, November 22, 1944, *Diario da Justice*, August 21, 1945, section *Jurisprudencia* (appended to No. 190, pp. 2969-2972); [1946] *Ann. Dig.* 86 (No. 37). On February 18, 1944, a Brazilian citizen, Jose Domingues Ramos, tried to enter the Admiral Ingram Camp in Recife (Pernambuco) in order to obtain payment of a bill from an American marine stationed there. This camp was a part of the American military bases temporarily established in Northern Brazil during the Second World War. The United States marine, Arthur James Gilbert, who was on guard at the entrance to the camp, sought to prevent Ramos from entering. Ramos persisted in his attempt and was shot by Gilbert; he died four days later.

The court held the Brazilian courts had no jurisdiction. The opinions, like those in the *Schwartzfiger* case, ranged over a wide area, and it is not easy to pinpoint the basis for the decision. Again, however, on the facts the defense that the defendant's act was done in the performance of official duty was available, both opinions emphasize that aspect, and the decision is most clearly supportable on that ground.

The Court, by Falcao, J., said in part, at pp. 87-88:

"But in those cases the offences were common penal offences committed by members of foreign armed forces who were present on Brazilian soil but were not on duty at the time. These circumstances necessarily led to the correct solution announced by the Government of the United States in response to the vigorous protest of the Brazilian representative. The present case, however, as appears from the proceedings, is quite different: the offender is a member of the armed forces of a foreign country which are stationed within a limited zone of the Brazilian coast with the express consent of the Government of Brazil and for the purpose of taking part in war operations in which our country also is engaged. Furthermore, the said marine committed the offense in the exercise of his specific duty as sentry at the camp." Azevedo, J., in a separate opinion, observed that:

"No question would arise if both the offender and the victim were members of the armed forces. As, however, the victim was a civilian, a distinction must be made: if the crime were devoid of any military aspect, the case would undoubtedly fall under the local jurisdiction. However, the case before the Court is of a typically military character. The act of the sentry who was guarding the camp was directed against a person who resisted the order not to enter it. In my view, the fact of the victim being a Brazilian civilian does not efface the pre-

The position that visiting forces are immune for offenses committed in the performance of official duty is to be distinguished from the position that such forces are immune for offenses committed while on duty. The latter concept predicates immunity on the time when an act is done, rather than the nature of the act. This is not to say there is no basis for immunity for acts committed while on duty. Subjecting a member of a visiting force to criminal liability for a private act committed when he was on duty does not interfere directly with the conduct of the affairs of the sending state, nor call into question the propriety of an act of that state. It does, however, involve claiming jurisdiction over an individual when he is acting as an integral part of an organized body of men serving the foreign state. Indirectly, there is interference with the performance of his duty. The functional basis for immunity for private acts committed while on duty can be viewed as more substantial than for acts committed on leave, but much less compelling than for acts committed in the performance of duty.

Discussions of immunity for duty-connected offenses often fail to distinguish between offenses in the performance of duty and offenses on duty. This is understandable. There is, unhappily, no

dominantly military character of the immediate defence of the camp's security." *Id.*, at 90.

Both opinions also appear to recognize the on-base concept, and there is language in each which suggests recognition of a wider immunity.

A note to the report of the case in the Annual Digest reads:

"For criticism of this decision see Accioly, "Conflito de jurisdicao em materia penal internacional," in *Boletim da Sociedade Brasileira de Direito Internacional*, I (1945), No. 2, pp. 96 ff. The author maintains that the crime was not military under international law; that it was not committed within the perimeter of the camp; that it represented an offence against a Brazilian citizen; that it took place in circumstances which would appear to have been a disturbance of the local public order; and that for these reasons the Supreme Federal Court was wrong in denying that Brazil had jurisdiction."

General Hickman, in the Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess., 39 (1955), after stating that in Brazil jurisdiction over American troops is concurrent except for two special groups which enjoy diplomatic immunity, referred to the decision in *In re Gilbert* and said: "It is understood that Brazilian authorities have agreed, as a matter of policy, that United States military personnel who commit offenses in Brazil will be turned over to United States authorities for trial, and none of our people have been tried during the reporting period."

sharp line which distinguishes one from the other. Even if attention is centered on the concept of offenses in the performance of duty, it is quite impossible to chart an acceptable perimeter. Limiting the concept to offenses expressly ordered will not suffice since there are acts the performance of which is inherent or implicit in every assigned duty. Nor can one easily draw a line between the normally acceptable way in which a duty should be performed and an abnormal, unacceptable way. An extreme deviation from the norm may readily be labeled a private act, but the middle ground presents real problems. Again, the decision regarding where the line should be drawn is inevitably influenced by the attitude taken toward how compelling a basis is necessary to justify giving immunity. Also, it is difficult to separate the issue from the related question of who is to determine whether an act was done in the performance of duty. Finally, the draftsmen of agreements are handicapped by the inadequacy of language to draw a sharp line.

The view that visiting forces should enjoy immunity for acts committed while on duty was expressed by Oppenheim¹⁴ and Lawrence.¹⁵ It was developed primarily in the decisions of the

¹⁴ "This rule, however, applies only in case the crime is committed either within the place where the force is stationed or in some place where the criminal was on duty." 1 Oppenheim, *International Law* 847-48 (8th ed., Lauterpacht, 1955).

The U.S. Memorandum, Hearings, H.J. Res. 309, *op. cit. supra*, note 12, at 416, in arguing for general immunity for visiting forces, commented:

"Oppenheim also suggests that if a crime is committed outside of the place where the force is stationed, the right of extritoriality or immunity from the local jurisdiction applies only in case the crime is committed 'in some place where the criminal was on duty'. Again there is no definition of 'on duty' although the example given suggests that a member of the armed forces while engaging in recreation or pleasure is 'not on duty'. A soldier is never off duty in the sense in which that term is usually understood by civilians. Even though temporarily permitted to absent himself from strictly military tasks for recreation and pleasure, he is still under the orders of his commanding officers and responsible to them for his acts. Common law crimes as well as ordinary breaches of discipline are military offenses for which he is responsible whether they are committed when he is under immediate command or not."

With respect to the statement that "A soldier is never off duty * * *," see *Manuel v. Ministère Public*, note 16 *infra*, in which the argument was expressly rejected.

¹⁵ "The troops * * * would be under the jurisdiction and control of their

Mixed Courts of Egypt, in terms of the concept of *service commandé*.¹⁶ The Mixed Courts came in time to doubt that the simple

commanders as long as they remained within their own lines or were away on duty but not otherwise." *The Principles of International Law* 246 (6th ed. 1915).

¹⁶ In the *Triandafilou* case, *supra*, involving a member of the crew of a warship, the court said:

"Whereas, the sole question which presents itself * * * is that of knowing whether Triandafilou was or was not carrying out a mission under instructions at the moment when he committed the aggression * * *.

"Whereas the judgment * * * held that if Triandafilou came on shore to discharge a duty (purchase of food for the needs of the ship), and only with permission to return on board by midnight, he was no longer on duty when, coming out of a bar on the Place Mohammed Ali in a state of intoxication some minutes before midnight, he struck with a knife an agent of the local police * * *.

"Whereas if the members of the crew of a warship enjoy the immunity from jurisdiction of the vessel itself when they are on shore this is only true in so far as they can be construed as agents for executing orders which are given them in the interests of the vessel; whereas it is in short the immunity of the vessel which projects itself beyond the vessel for the realization of its own ends; whereas such is the basis of the principle which withdraws them from the local jurisdiction when they are on duty; whereas it follows that these words should be interpreted not with reference to the activities of him who has received the order but with reference to him who has given the order and must take cognizance of its execution; and whereas in the instant case Triandafilou did not return on board to give an account of his commission, and whereas he was therefore still on duty when he committed the aggression with which he was charged; whereas it results from these considerations that the first ground for the appeal is well granted * * *."

The basis for the broad exception recognized in the *Triandafilou* case is better expressed in the opinion of the Court of Cassation in *Ministère Public v. Tsoukharis*, Feb. 8, 1943, [1943-1945] Ann. Dig. 150 (No. 40), a case involving a Greek soldier who had been ordered to go from Alamein to Amrich, instead went to Alexandria, and was involved with three other Greek soldiers in an affray in which a British corporal was killed. The court, after referring to its decision in *Triandafilou*, said:

"The question arises whether the same rule applies to soldiers who leave their military quarters. The exception in favour of a sailor on shore on duty flows from the general principle of the jurisdictional immunity of armed forces. This principle is based on the tacit understanding to respect the sovereignty of a foreign Power, and should therefore, logically, be extended to apply to soldiers who, though outside their military quarters, are regarded as forming an integral part of the corps to which they belong. They would be so regarded where

they are on duty under orders to carry out a mission for the needs of the corps."

Shortly afterward, in *Manuel v. Ministère Public*, Court of Cassation, Mixed Court, March 8, 1943, 39 A.J.I.L. 349 (1945), the court said that " * * there do not exist, in short, any serious divergences in the literature except as concerns violations of common law disturbing the public peace and security committed by a soldier outside of the military premises, either against an inhabitant or against other soldiers, on condition, moreover, that the offender is not on duty, for, in the latter case, he is considered as an integral part of the forces to which he belongs * * *."

An armed force is, in other words, an instrumentality of a foreign state such that there is a functional basis for immunity for the individual soldier or sailor so long as he is a part of the force. He is a part of it when he is within a camp or on a warship, or when he is physically separated from the main body but still on duty. He is not when he is separated from the main body on leave.

The Mixed Courts soon began to question whether this rationalization could support an immunity so broad in scope as that recognized in the *Triandafilou* case. They also began to doubt whether the certificate of the accused's commanding officer as to his on-duty status—counsel for the accused had relied on such a certificate in the *Triandafilou* case—should be considered as conclusive.

The retreat began with the *Tsoukharis* case, *supra*, in which the accused Greek soldier, ordered to go from Alamein to Amrich, went to Alexandria instead. The *Chambre du Conseil* allowed the plea the accused was immune on the ground it had to accept the certificate of his commanding officer that Tsoukharis was on duty at the time of the offense. On appeal, counsel for the state argued that the decision involved an abdication of the court's function to control the scope of jurisdictional immunities. (See Barton, 1954 Brit. Yb. Int'l L. 340, 353). The Court of Cassation, in reversing and sending the case back on the ground the judgment appealed from did not state sufficiently the reason on which it was based, said:

"The decision of the *Chambre du Conseil* has held that Constantin Tsoukharis was on duty, but has not specified this duty in a manner which would enable the Court to decide whether the *Chambre du Conseil* has properly applied the rules of public international law. 'Mission under orders' means a mission dictated by military requirements. It does not appear from the reasons given for the decision of the Court below that such a duty existed in the present case. Furthermore, the order has to be looked at (as this Court has already held on June 29, 1942) from the point of view of the person who gives it and not from that of him who receives it. Applying this principle it seems clear that the person giving the order is interested in the report of the person sent, whereas the latter is interested in prolonging the duration of the mission. *If therefore there is no report to make there is no order in question, and a soldier who abuses his mission to prolong his leave will cease to be covered by immunity from jurisdiction.* In

fact that a soldier *en service commandé* was “an integral part of the forces to which he belongs” furnished an adequate basis for immunity. They moved toward a more restricted view, but never wholly abandoned the idea that an offense “*en service commandé*” was subject to the exclusive jurisdiction of the sending State.¹⁷

The rule developed by the Mixed Courts, according immunity for on-duty offenses, never enjoyed general acceptance,¹⁸ nor has it found favor among treaty negotiators. It is not incorporated in the NATO Agreement. It was not rejected by the negotiators of that Agreement—an immunity for duty-connected offenses so broadly conceived was never proposed or discussed.

More important, the NATO Agreement accords immunity even for offenses committed in the performance of duty only in limited degree. The sending state has primary, but not exclusive, jurisdiction over “offenses arising out of any act or omission done in the performance of official duty.”¹⁹ Moreover, the receiving state may even have exclusive jurisdiction over such an offense in the event, probably unlikely, that it is “punishable by its law but not by the law of the sending state.”²⁰ The limited immunity granted does, however, extend to the civilian component as well as to members of a force.

There was vigorous opposition among the NATO negotiators to according even this limited immunity for offenses committed in the performance of duty. They were, of course, free to recognize an immunity for such acts in such degree as they chose, or deny it altogether, regardless of any rule of international law on the subject.

Several representatives would have preferred to deny immunity

order that the Court of Cassation should be able to exercise its power of judicial review it is essential that the alleged mission should be defined with due regard to the facts.” (Emphasis added.)

¹⁷ See the cases of Camboures, Cour d’Assises, Journal des Tribunaux Mixtes, 26/27 January 1944, p. 2; Gougoulis, Cour de Cassation, J.T.M. 28–29 January 1944, p. 3; Scordalos, Cour de Cassation, J.T.M. 19/20 May 1944, p. 2; Mijouicetal, Chambre du Conseil, J.T.M. 24/25 August 1945, p. 3.

¹⁸ In the immediate post-World War II period, there were instances of American troops being tried by foreign courts for on-duty offenses. Statement of the Department of State, Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part 2, 84th Cong., 2d Sess., 556 (1955).

¹⁹ Article VII, para. 3(a) (ii).

²⁰ Article VII, para. 2(b).

for official acts altogether,²¹ as did the Brussels Treaty.²² Under that Treaty the receiving state was not even enjoined to give "greatest sympathy" to a request for "transfer," i.e., waiver, in such cases, as they were where an offense was *inter se*. This suggests the basis for opposition to the immunity. The argument that to exercise jurisdiction over visiting forces for offenses committed in the performance of duty is to interfere with the conduct of the affairs of a foreign state may be logically compelling. For some, this consideration is outweighed by their grave concern that the receiving state have jurisdiction in all cases in which the victim is a national of the receiving state. The point was not emphasized in this context in the NATO negotiations,²³ but was repeatedly made in relation to other issues. It was most vigorously pressed in the debates in the British Parliament.²⁴ The

²¹ "The first point discussed was whether subparagraph [3(a)] (ii) should include offences committed in the performance of official duty. Several Representatives were of the opinion that they should be excluded." MS-R (51)14. The Portuguese representative had earlier put forward a redraft of the criminal jurisdiction articles which made no reference to an immunity for offenses committed in the performance of duty (MS-D(51)13) and thereafter proposed that paragraph 3(a) (ii) be omitted (MS-D(51)16).

²² Page 145, *supra*.

²³ The Belgian representative "wished to reserve judgment [on the United States Draft] only with respect to cases where the victim of the offence was a national of the receiving State, even if the offence was committed by a member of an armed force on duty." MS-(J)-R(51)2.

²⁴ The statements made are to be read in the light of the fact that the Bill to implement the NATO Agreement, as introduced, apparently used the phrase "in the course of duty" rather than "in the performance of duty." The Home Secretary questioned that the difference in language was material, but agreed it should be changed. In the course of the debate Mr. Michael Stewart said:

"I cannot understand on what principle anyone defends the proposition that a foreign soldier who does some damage * * * to the citizens of the country which he is visiting should be exempt from answering for those offences in the courts of the country which he is visiting merely because it is alleged that what he did was done in the course of his duty." 505 H.C. Deb. (5th ser.) 599 (1952). See also the comment of Mr. John Strachey, *id.*, at 578, comparing an immunity for *inter se* offenses to that for offenses in the course of duty.

Mr. E. Fletcher moved an amendment to eliminate the clause relating to the immunity. He said, after referring with approval to the immunity for *inter se* offenses:

"But the case is totally different where the offence is committed not against a foreigner or his country but against a British subject. It is

intensity with which this view may be held is illustrated by the feeling aroused in Japan by the *Girard* case.²⁵ One may surmise that it is the peripheral situation, such as the *Girard* case, rather than the case where the act was much more clearly in the performance of duty, which prompts such concern.

The grant of immunity in the NATO Agreement for offenses committed in the performance of duty was apparently included at the insistence of the United States representative. He indicated that it would extend only to a limited range of cases.²⁶

that class of case which is really causing the greatest concern among those who are troubled about this Bill.

"Therefore I would like to exclude from Clause 3 any offence committed against a British subject, even though it is committed in the course of duty by a member of a foreign force." 505 H.C. Deb. (5th ser.) 1158 (1952). See also a further comment by Mr. Stewart that "This is, I think, the only part of the Bill in which the power of the British courts to deal with the offence is set aside where the person suffering from the offence is a British subject." *Id.*, at 1161.

²⁵ See p. 228, note 32, *infra*.

²⁶ The United States representative, in explaining the United States Draft, said that "The Draft provided that the Courts of the receiving State normally exercised jurisdiction." The United States draft however laid down two exceptions:

"Article 6/2(d). An offense against the laws of the receiving State arising out of an act done 'in the performance of official duty' by a member of a 'contingent' or pursuant to a lawful order issued by competent authority. Very few categories of cases of this type would arise; examples would be sentinels using unnecessary force when on duty, or automobile accidents of drivers proceeding on official duty." MS-R(51)4.

When at a later meeting, it was proposed that the clause according the immunity be eliminated (see note 21, *supra*) the United States representative "pointed out, however, that there was a possibility of offences being committed in the performance of an official duty." MS-R(51)14.

The Canadian representative, in MS-D(51)15, put forward a proposal that "for the existing words in Article VII, paragraph 3(a) (ii)" there should be substituted the clause "Acts or omissions done or omitted pursuant to an order issued by a military superior of the State and carried out according to the tenor thereof." He explained: "It would be most desirable to confer on a receiving State a primary right to exercise jurisdiction over a member of a force or civilian component who carried out his superior's order in an unlawful manner which resulted in injury or damage."

The Canadian representative returned to the point later, proposing that the clause "should be expanded to include a further definition of offences arising out of any act or omission done in the performance of official duty, which would be worded as follows in French: 'et rentrant dans l'ordre des devoirs de l'intéressé'. The Working Group came to the conclusion that it

Several other representatives nevertheless sought further to limit the scope of the immunity, without success.²⁷ Concern was also expressed that the language in which the immunity was recognized was too ambiguous, but apparently no one put forward a more aptly phrased provision.²⁸

It is not surprising, in view of the scanty record and the admitted difficulties which the negotiators encountered in delineating the scope of the immunity they meant to confer, that disagreements have arisen regarding its application in specific cases. The Turkish authorities for a time took a most restricted view of the reach of the immunity. "It was argued that the killing of a pedestrian was not an act directly connected with the driving of a truck on official business, and that a person ordered to go to a place to perform certain duties and return was 'in line of duty' while he was performing those duties, but not on his return

was very difficult first to find an equivalent expression in English and, secondly, to define the circumstances in which an offense could be regarded as falling within the limits of the duties of the person concerned. The point would chiefly arise in a few individual cases where special circumstances were involved: an example had already been given * * * by the Italian representative (MS-R(51)14)." MS-R(51)18.

²⁷ The Belgian representative proposed that the immunity should not cover traffic accidents. MS-R(51)8.

The Italian representative proposed that "it should be specified that such act was done not only in the performance of official duty, but also but (sic) within the limits of such duty. He gave the example of a driver travelling between two towns on official business who, for personal reasons, deviated from the direct route. If an accident occurred in the course of the deviation, the driver was no longer acting within the limits of his official duty." MS-R(51)14.

²⁸ The French representative, at an early meeting of the Judicial Subcommittee, expressed approval of the United States draft, but thought "it would be necessary to define more closely the concept of a member of an armed force 'on duty.'" MS-(J)-R(51)2.

At a later meeting of the Working Group the Canadian representative proposed that in subparagraphs (1) and (11) the word "offences" should be replaced by the phrase "acts or omissions." "Several delegations also proposed further amendments [unspecified] to the definition of the offences appearing in subparagraph (11)." MS-R(51)14.

The only changes made from the language used in the United States draft were (1) changing "act" to "act or omission" and (2) at the suggestion of the United States representative [MS-D(51)20], striking out the clause "or pursuant to a lawful order issued by the competent authorities of that State." MS-R(51)14.

trip.”²⁹ The French and Italian authorities have, on the other hand, agreed that a member of the armed forces is in the performance of official duty when driving his own car between his home and his place of duty.

The clause “offences arising out of any act or omission done in the performance of official duty” describes a class of acts. The test prescribed concerns the nature of the act, not the status of the actor. It is clear, then, that the clause does not cover all offenses committed while the offender was on duty. The more difficult question is what the nature of the act must be to fall within the class. The crucial point is the meaning to be given to the words “offences arising out of.” The words could mean “offences consisting of” or the equivalent, in which event the immunity would extend only to acts or omissions done in the performance of official duty. It seems more sensible to interpret them as meaning “offences originating in,” “related to,” or, in the language of the Turkish statute, “done in connection with.” This interpretation enlarges the class, but does not clearly define its outer limits.

Those concerned with the interpretation of the clause have understandably reached into other areas of the law for assistance. The American military authorities have apparently interpreted the provision as analogous to but somewhat broader than the agency concept of “scope of employment.” Much less useful is the analogy to “line of duty” used in the Federal Tort Claims Act and in legislation conferring benefits, narrowly interpreted in

²⁹ Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction* 49 (1957). See also the testimony of General Hickman, Hearings Before the Subcommittee of Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st sess., 28 (1955). The Turkish position, as has been said (Snee and Pye, *ibid.*) is in line with the Italian and Canadian proposals, *supra*, notes 27 and 28, which were rejected by the Working Group.

Turkish legislation (Law No. 6816 of July 16, 1956) was enacted that the provision of the NATO Agreement was to apply to any “offense arising out of any act or omission done in the performance of duty or done in connection with the performance of duty,” and this has enabled the Turkish and American authorities more readily to reach agreement in specific cases. The added language, “done in connection with the performance of duty,” can be considered as a clarifying interpretation of the treaty provision, but not as extending its intended scope. See Snee and Pye, *ibid.*, and the testimony of General Hickman, *ibid.*

the first case, broadly in the second. The French interpretation is apparently largely shaped by the concept of "*en service commandé*"; the Italian authorities based their conclusion regarding the status of one driving between home and place of duty on the ground that he would have been considered at work under the Workmen's Compensation law.³⁰

These analogies may be useful, but only within limits. Even with respect to the concept of "scope of employment," one can query whether the factors of policy which have shaped the limits of the vicarious liability of a principal for the acts of his agent are entirely relevant where the issue is not one of civil liability or even criminal liability but of criminal jurisdiction. The divergent interpretations of "line of duty" under the Federal Tort Claims Act and the Acts conferring benefits on members of the armed services suggest how irrelevant they are in interpreting the quite different language of the NATO Agreement, addressed to a quite different problem. There is need to remember that the problem under the Agreement is a new and unique problem, and that the language of the Agreement, "offenses arising out of any act or omission done in the performance of official duty," is new, and was a response to a particular need. That need was to ensure the commanding officer's control over members of a force in the carrying out of their duties, and hence to cast on the sending state the responsibility for the manner in which those duties are performed. If the act is not one which is or could be considered to be related to carrying out the mission of the force, it is not covered. This approach may not furnish a rule of thumb for the solution of the hard case; it is, however, likely to prove a surer guide than a concept drawn from another field, formulated to solve quite different problems.³¹ Although this may suggest

³⁰ See, generally, Snee and Pye, *op. cit. supra*, note 29, at 47-50.

³¹ Certain American military authorities in France have taken the position that if one of the elements of a crime is that it be done with a specific intent, the sending state cannot have primary jurisdiction, because the presence of the specific intent is inconsistent with the act being in the performance of military duty. Specifically, it was determined that, where one assigned to a Special Services unit who was to arrange tours for servicemen embezzled the money he collected instead of turning it over to the French bus company, the United States did not have primary jurisdiction because the intent to embezzle was inconsistent with his acting in line of duty. The provision of the Treaty, however, establishes a test for

that the class of cases over which the sending state has primary jurisdiction is relatively broad, one should bear in mind the issue is *which* state shall try and punish, not *whether* the offender shall be tried and punished.

The *Girard*³² case provoked the greatest controversy regarding the correct interpretation of the provision. Girard was under orders to guard a machine gun on a firing range being used by the American forces. A Japanese woman was collecting cartridge cases in the area. Girard placed a cartridge case in his grenade launcher, fired, and killed the woman. Either he did so to guard the machine gun, in which event he seemingly used excessive force, or did so as the climax to a bit of horseplay which involved enticing the victim and others within range and then frightening them by launching cartridge cases in their direction.

The controversial issue was not whether Girard was guilty of a crime under Japanese or American law. Presumably he was under both, on either version of the facts. The issue was simply whether the United States or Japan had primary jurisdiction to

allocating criminal jurisdiction, not a test of criminal liability. Moreover, it gives primary jurisdiction to the sending state of "offences arising out of acts or omissions done in the performance of official duty," and the words "arising out of" must be given due weight. Perhaps the intent with which an act was done would be relevant if the issue was whether the act was done in the performance of duty, but it seems questionable that it is relevant when the issue is whether it arose out of any act in the performance of duty. If, in the case cited, the accused had deposited the funds in a bank in his own name, this could be viewed as such a deviation as not to be in the performance of duty, but it still would seem to be an act arising out of an act done in the performance of duty, that is, collecting the money. It seems doubtful that it would be more or less so if the deposit was made with the intention of turning the money over to the bus company later, or diverting it to the accused's own use.

In any event, there are certainly cases in which an act is done with the requisite intent and is nevertheless unquestionably one arising out of, or even directly in the performance of official duty. If, in *In re Gilbert, supra*, note 13, the sentry used excessive force, it would constitute such a case, and certainly many of the war crimes qualify. Introducing the test of the specific intent with which an act was done thus not only adds an element not expressly included in the NATO provision, but one which is clearly not applicable to all cases and is of questionable application in any case. The rejection of the Italian and Canadian proposals suggests the NATO negotiators did not intend to impose such an added test. See Snee and Pye, *op. cit. supra*, note 29, at 48-49.

³² *Wilson v. Girard*, 354 U.S. 524 (1957).

try him. The United States had such primary jurisdiction if what he did was an offense "arising out of any act or omission done in the performance of official duty"; Japan had such primary jurisdiction if it was not. If he launched the cartridge case to guard the machine gun, then, however mistaken his judgment as to the appropriateness of employing such drastic means—even if he fired to kill—it seems clear that his act was within the provision. The Japanese contention, supported by reference to Agreed View No. 39,³³ which defined "official duty" as "any duty or service required or authorized to be done by statute, regulation, the order of a superior or military usage," that the killing was not authorized, seems misconceived. As has been suggested, the issue was not whether Girard's act was done in the performance of official duty, as thus defined, but whether it was an offense "arising from" an act so done.

If, on the other hand, Girard was engaged in horseplay, then his act was a private act, not arising from, related to, or originating in the performance of his duty, and the United States did not have primary jurisdiction.

Basically, then, the issue in the *Girard* case was one of fact, which, since the United States waived jurisdiction, was not resolved.³⁴

Our status of forces agreements vary in the recognition accorded the concept as a basis of immunity. It was pointed out

³³ Agreed to by the Criminal Panel, Jurisdiction Subcommittee on October 29, 1953; FEC Pamphlet No. 27-1, *Criminal Jurisdiction in Japan*, January 1956.

The affidavit of Robert Dechert, General Counsel of the Department of Defense, offered in the *Girard* case and published in an appendix to the opinion of the Supreme Court, 354 U.S. 531, 542, states that a circular of the United States Army Forces, Far East, in January 1956, stated:

"The term 'official duty' as used in Article XVII, Official Minutes, and the Agreed Views is not meant to include all acts by members of the armed forces and civilian components during periods while they are on duty, but is meant to apply only to acts which are required to be done as a function of those duties which the individuals are performing. Thus, a substantial departure from the acts a person is required to perform in a particular duty usually will indicate an act outside of his 'official duty'."

³⁴ After extended discussions in the Joint Committee, the United States, on instructions from the Department of Defense, waived jurisdiction. See Appendix B to the Opinion of the Court in *Wilson v. Girard*, 354 U.S. 544, at 547.

above that although the NATO Agreement gives primary jurisdiction to the sending state over both *inter se* offenses and offenses in the performance of duty, the latter concession was made only with reluctance. Some, though not all, of the other status of forces agreements to which the United States is a party, reflect a similar attitude.

The early Agreement relating to the Leased Bases did not refer specifically either to *inter se* or duty-connected offenses.³⁵ Jurisdiction was in large part determined by the place of the offense. The United States had primary jurisdiction over most offenses committed by "other than a British subject," e.g., a member of the American forces or civilian component, if the offense was committed within a base, but only concurrent jurisdiction if it was committed outside a base. The issue of whether an offense was *inter se* or duty-connected was of no moment.

The revised Leased Bases Agreement and the Bahamas Agreement both take account of whether an offense is a "United States interest" offense, as well as of the place where it occurs, but neither makes any reference to whether the offense was duty-connected.³⁶ If, in other words, a duty-connected offense is committed against a British subject, the latter fact outweighs the former.

The Agreement with the Dominican Republic was particularly interesting in this respect. Article XV gave the United States exclusive jurisdiction over offenses committed by members of its forces and others subject to its military law except Dominican nationals or local aliens, except with respect to offenses committed outside the sites against a Dominican national or local alien. In the latter case, jurisdiction was concurrent, and the Mixed Military Commission was to decide which government should exercise jurisdiction "and shall give consideration to whether the offense arose out of any act or omission done in the performance of official duties." That an offense was *inter se* was, then, enough to give the United States exclusive jurisdiction, but

³⁵ Except that some duty-connected offenses could constitute "offenses of a military nature," as to which the United States had primary jurisdiction.

³⁶ The more recent Agreement with the Federation of the West Indies, in Article IX (3), follows the NATO formula, giving the United States primary jurisdiction over "offences arising out of any act or omission done in the performance of official duty." The Agreement with Australia includes an identical provision, Article 8 (3) (a) (ii).

that it was committed in the performance of duty was not quite enough. This was only a factor to be taken into account in resolving the conflict of jurisdiction and was to be weighed against the fact the victim was a Dominican national or local alien.

The Philippines Agreement,³⁷ on the other hand, gives the United States exclusive jurisdiction over on-base offenses, and over off-base offenses if they are either *inter se* (narrowly defined) or committed by a member of the armed forces "while engaged in the actual performance of a specific military duty." The latter immunity does not, however, cover the civilian component. The Libyan Agreement, which gives the United States exclusive jurisdiction over on-base offenses by Americans, copies the NATO Agreement provisions with respect to both *inter se* offenses and offenses in the performance of duty, and extends the latter immunity to members of the civilian component. Finally, the Saudi Arabian Agreement recognizes no immunity for offenses in the performance of duty as such; Saudi Arabia has jurisdiction over all offenses committed outside the described areas.

Broadly speaking, then, the concept of the duty-connected offense has been given only limited application in post-World War II treaties. The view that a sending state should have exclusive or primary jurisdiction over offenses committed by a member of a visiting force while on duty, i.e., predicating immunity on his on-duty status, has not been expressly recognized in any agreement. Even immunity for offenses committed in the performance of duty, i.e., predicating immunity on the official nature of the act, has been granted only with limitations or even not at all. The explanation apparently lies in the great reluctance of receiving states to surrender their jurisdiction over offenses against their nationals. They are more prepared to surrender their jurisdiction over offenses which are purely private acts but involve only mem-

³⁷ Article XIII, par. 4 provides that "* * * If any offense falling under paragraph 2 of this Article [giving the Philippines jurisdiction "over all other offenses" committed outside the bases] is committed by any member of the armed forces of the United States

(a) While engaged in the actual performance of a specific military duty * * *

(b) * * * the fiscal * * * shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction."

The word "while" suggests the test is the status of the offender, not the nature of the offense, but the words "actual performance" and "specific military duty" narrow the scope of the immunity.

bers of the sending state's military community than they are over offenses committed in the performance of duty which involve their own citizens.

DETERMINATION THAT THE OFFENSE WAS DUTY-CONNECTED

Since whether the sending or receiving state has jurisdiction may turn on whether the offense was committed in the performance of duty, some procedure must be established for deciding whether it was so committed. The ambiguity inherent in the concept of performance of duty has made the procedural question both crucial and productive of controversy.

Where the point has not been settled by agreement, the correct view seems to be that the court which has custody of the accused, rather than the military authorities of the sending state, has jurisdiction to decide the question. The State Department took this position in the Hearings on the NATO Agreement.³⁸ The cases in which a person claims diplomatic immunity, or those where the claim is made that a vessel or a corporation or other agency is an instrumentality of a foreign government so employed as to entitle it to immunity, provide close analogies. The issue is not, however, analogous to the much debated question of whether the executive or the judiciary of the territorial state should decide such points. That is a question of the appropriate allocation of power within the government of the territorial state. Such issues are raised as whether the conduct of foreign affairs will be embarrassed if such matters are not left to the executive.

³⁸ A memorandum submitted by the State Department stated: "As a matter of practice the court having custody of the accused has the right to determine its own jurisdiction, i.e., whether the offense was committed in the performance of official duty. It is understood that due weight will be given to the views of the appropriate authorities of the visiting force as to whether or not the offense was so committed." Hearings Before Senate Foreign Relations Committee On Agreements Relating to Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters, 83rd Cong., 1st Sess., at 68 (1953). See also the comments of Mr. Phleger, Legal Advisor of the Department, *id.* p. 71. See also the Restatement, *Foreign Relations Law*, Section 62, Comment c, p. 195: "Because the question presents a jurisdictional issue, any tribunal deciding whether or not to exercise its jurisdiction in a particular case must make its own finding. Acceptance of the certification of the commanding officer that an accused serviceman was acting in the performance of duty when the act in question was committed is one method of resolving this problem."

See also 2(b) of the Reporters' Notes to Section 65 at 206-207.

Rather, the analogy is to the problem of the weight to be given, in the kinds of cases cited, to a communication from the ambassador or other representative of the sending state to a court or the foreign office of the territorial state on the matter of status. On this, judicial decisions and the practice of states seem in harmony that the communication is not conclusive, and that the ultimate power to decide is in the court of the territorial state, based on all the evidence.³⁹

There are, however, persuasive arguments for permitting the decision of whether an offense by a member of a visiting force was committed in the performance of his official duty to be made by his commanding officer. More is involved than is implied in the statement that his commanding officer knows best what the duties of the accused are. Inquiry by an agency of a foreign government into the issue can involve an inquiry into the mission of the visiting force, its command structure, and comparable matters. Security considerations may suggest the inappropriate-

³⁹ There is some early authority which looks the other way. On this whole question, see the exhaustive studies by A.B. Lyon, "The Conclusiveness of the Foreign Office Certificate," 1946 *Brit. Yb. Int'l L.* 240; and "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department," 1947 *Brit. Yb. Int'l L.* 116.

In the Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 84th Cong., 1st Sess. (1955) after the action of the British Parliament in providing that the certificate of the commanding officer should be sufficient evidence until the contrary was shown had been commented on, the following exchange occurred between Senator Ervin and Mr. Leigh, Ass't General Counsel of the Department of Defense at p. 30:

"Senator Ervin: I expect that position would harmonize pretty much with our own civil law, that most courts would reserve the right to pass on that question when it arises before them. So I don't know that we can complain very much about that.

"Mr. Leigh: You can argue that this was a jurisdictional fact. Take the situation for example, when an ambassador is tried in a case of the Supreme Court's original jurisdiction. I would assume that the Supreme Court would also reserve the right to determine whether it had jurisdiction in an ambassadorial case, but if the State Department gave a statement as to whether an individual was or was not an ambassador, I think our Supreme Court would probably regard it as conclusive for the determination of that jurisdictional fact. I think it is a difficult question.

"Senator Ervin: I can understand that they would be very reluctant to surrender that power. While it would be desirable for us if they would, I don't think we can complain too much if they don't."

ness of such an inquiry, particularly if the duties of the accused lie in a sensitive area or concern intelligence. Moreover, time is important where discipline is involved and the commanding officer can act more quickly than the local authorities.⁴⁰

The cases decided without benefit of a treaty provision are inconclusive. In the *Schwartzfiger* case the Panamanian court considered as "established" by "the evidence of Major General William Lassiter, Commanding General of the American Army in the Canal Zone" the fact, among others, that "in crossing that city by Avenida Bolivar, in the discharge of his duty, Schwartzfiger's car struck one of the pillars * * *." ⁴¹

The Mixed Courts of Egypt at first took the position that the certificate of the commanding officer was determinative of the issue. They later, however, retreated from this position, as they did on the substantive issue of whether an offense "*en service commandé*" was exclusively within the jurisdiction of sending state.⁴²

The NATO Agreement does not deal expressly with the point. The United States during the negotiations consistently took the position, without recorded dissent by any other representative, that the decision was for the military authorities of the sending state.⁴³ Several of the NATO members have, contrary to this

⁴⁰ It was on this ground that the NATO negotiators rejected a proposal of the Portuguese representative that an appeal to arbitration should be provided in order to decide whether an act had been done in the performance of official duty. "It was pointed out that such arbitration was not consistent with the speed required in the repression of criminal offenses." MS-R(51)1r. The truth of this observation is illustrated by the *Girard* case.

The Reporter's Notes 2(b) to Section 65 of the Restatement, *Foreign Relations Law*, state: "Notwithstanding the procedure followed in the *Girard* case, the most satisfactory, and probably the most accurate, method of determining whether or not an act was performed in the course of duty, is to accept the certificate of the serviceman's commanding officer. This, of course, requires the territorial state to trust that the authorities of the force will act in good faith, but the agreement to admit the force must presuppose that good faith will in fact be exercised."

⁴¹ 21 A.J.I.L. 182, 184 (1927).

⁴² *Supra*, pp. 220, 222, notes 16 and 17.

⁴³ "In reply to a further question raised by the Netherlands Representative, the Chairman [Brig. Gen. Snow, U.S.] pointed out that it would be for the sending State to decide whether the members of a force were on official duty or not. This was part of the normal cooperation between allies." MC(J)-R(51)5.

The United States Representative "pointed out, however, that there was

understanding, been reluctant to treat the certificate of the accused's commanding officer as controlling.

The Bill introduced in the British Parliament to implement the NATO Agreement gave controlling effect to the certificate. This prompted some protest—though nothing like that against the provision which made conclusive a certificate that the person named was a member of the visiting force—and the Home Secretary proposed an amendment, which became a part of the Act, under which the certificate is sufficient evidence unless the contrary is proved.⁴⁴ This departure from the position taken by the

a possibility of offences being committed in the performance of an official duty; the military authorities of the sending State, and not those of the receiving State, were alone capable of deciding whether or not an official duty was being carried out at the time." MS-R(51)14.

The United States Representative "stated that for obvious reasons of military discipline, his Government would not be likely to accept the possibility of leaving any authorities other than the military authorities free to decide whether or not an offence had been committed in the performance of official duty." MS-R(51)14.

"Although the Status of Forces Agreement does not specify who shall have the authority to make a final determination as to such matters, it is the position of the Department of Defense, based upon the minutes of the NATO working group which drafted the SOF Agreement, that such determination should properly rest with the authorities of the sending state." General Hickman, Hearings, Subcommittee of the Senate Armed Services Committee, *op. cit. supra*, note 2, at 28.

⁴⁴ 505 H.C. Deb. (5th Ser.) 595 (1952); 505 H.C. Deb. (5th ser.) 1183, 1187 (1952).

It is interesting that, when moving the second reading of the Bill, unamended, in the House of Lords, the Lord Chancellor, Lord Simonds, in referring to the determination of whether an offense was committed in the course of duty, said: "There is no other way to deal with such a matter except to give to one authority or the other the absolute right to say whether the act which was done was done in the course of duty." 177 H.L. Deb. (5th Ser.) 463 June 26, 1952, col. 463. In the subsequent discussion of the amendment Earl Jowitt, ex-Lord Chancellor, objected on the ground that if the certificate was not conclusive, there could be controversy, and there should be no uncertainty regarding which court has jurisdiction. 177 H.L. Deb. (5th Ser.) 466-70 (1952).

There was no reference to the Summary Record of the NATO negotiations, which was at the time still classified.

See the comments of General Hickman and Mr. Leigh, Hearings, Subcommittee of the Senate Armed Services Committee, *op. cit. supra*, note 2, at 29-30.

United States in the NATO negotiations, acquiesced in by the other members, has made no real difference in practice.⁴⁵

France has agreed to accept the determination of the American military authorities that an offense was committed in the performance of duty, provided the determination is made by a staff judge advocate or other legal officer.⁴⁶ Earlier difficulties with Turkey have also been resolved,⁴⁷ as have those with Italy, though less satisfactorily.⁴⁸

The situation in Japan, so much mooted in the *Girard* case, resembles that in the United Kingdom. The Agreed Minutes to the Administrative Agreement provide that a certificate of official duty issued by the commanding officer "shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved," but the certificate "shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure," which reserves to the court power to determine matters of fact.⁴⁹ But Agreed View No. 43⁵⁰ provides that if the Chief Prosecutor considers that there is proof con-

⁴⁵ "While such a certificate is not, under the Act, conclusive evidence, in practice no disputes have arisen on this point between the American authorities and those of the United Kingdom. The British courts have consistently accepted the determination made by the local commanders * * *." Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction* 51-52 (1957).

⁴⁶ Gen. Hickman, Hearings Before the Subcommittee of the Senate Armed Services Committee On Operation of Article VII, NATO Status of Forces Treaty, 85th Cong., 1st Sess. 17 (1957).

⁴⁷ The Turkish authorities initially took the position the Turkish courts would decide the issue, and in some cases they did so. On July 16, 1956 a law was passed which provided that "the basis regarding the establishment of the status of duty" would be decided by the two governments. Shortly afterward, on July 28, an agreement was reached that a certificate of the highest ranking officer of the United States forces in Turkey would be accepted by the Turkish courts. General Hickman, *id.* at 17, 35; Snee and Pye, *op. cit. supra*, note 8, at 52. The agreed procedure has occasioned difficulty because American installations are spread around the country, and the issuance and delivery of a certificate may be delayed until after trial in a Turkish court has begun. *Id.* at 52.

⁴⁸ No statute or decree governs the situation in Italy. The Italian authorities have informally agreed that the determination is for the American military authorities and in general the courts have acquiesced, but some prosecuting officials have demurred. *Id.* at 53.

⁴⁹ *Id.* at 53.

⁵⁰ *Supra*, p. 229, note 33.

tradicting the certificate, the matter should be referred to the Joint Committee. It was the inability of the Joint Committee to agree which prolonged the controversy in the *Girard* case.

The Agreement with West Germany is in this regard more nearly in keeping with the understanding of the NATO negotiators. The certificate of the "highest appropriate authority of such sending State" is almost, but not quite, conclusive.⁵¹

The relevant provisions of the Agreement with the Philippines is in sharp contrast with the understanding reached by the NATO negotiators. Where an offense is both off-base and not *inter se*, so that the Philippines may have jurisdiction, the decision as to whether the offense was committed while the accused was "engaged in the actual performance of a specific military duty" is for the Philippine prosecutor. The American commander may appeal from an adverse decision to the Secretary of Justice, but the Secretary's decision is final.⁵²

The Dominican Agreement left to the Mixed Military Commission the decision of whether or not the fact that an offense arose out of any act or omission done in the performance of duty should be given weight in allocating jurisdiction. Presumably, the Commission was to determine whether the act was so done.⁵³ The Libyan Agreement is silent on the point.

In summary, it seems that where there is no treaty provision on the question, the decision is for the court which has custody of the accused—which may, of course, be a court-martial of the sending state. The agreements to which the United States is a party are in most instances silent on the point; only the Japanese, the West German, The Federation of the West Indies, and the

⁵¹ Article 18. Paragraph 2 of the Article provides that "The German Court or authority shall make its decision in conformity with the certificate. In exceptional cases, however, such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State."

The Agreement with the Federation of The West Indies provides, in Article IX (11) that "A certificate of the appropriate United States commanding officer that an offence arose out of an act or omission done in the performance of official duty shall be conclusive, but the commanding officer shall give consideration to any representation made by the Government of the Territory." The Agreement with Australia is silent on this point.

⁵² Article XIII, 4.

⁵³ Article XV, (1) (b).

Philippines Agreements are explicit, and they lay down quite different rules. The NATO negotiators did reach a clear understanding, contrary to the usual rule, that the decision was for the military authorities of the sending state. They did not, however, embody their understanding in the Agreement. The Written Record was classified for such a long period that some NATO members did not comply with the understanding. Subsequent negotiations have brought the situation in some countries near that contemplated, but not even the German Agreement accepts it *in toto*. There is, then, no generally applicable rule on this crucial issue.

CHAPTER XII

WAIVER

A state may waive jurisdiction in any case ¹ and so also may it waive the immunity of any of its representatives. Since any immunity is predicated on an interest of the state, it is a privilege not of the person but of the state he represents.² This principle applies to members of the armed forces as well as to diplomats.³ The possibility of such a waiver is specifically noted in the *Manual for Courts-Martial*, United States, 1951.⁴

The NATO Agreement provides for waiver of the primary right to jurisdiction by either the receiving state or the sending state.⁵ Waiver by the receiving state has played a larger role than the negotiators seemingly anticipated. There is reason also to suppose that the negotiators contemplated waiver by the sending state would be more common than has been the case.⁶ Other

¹ As when a state agrees to the extradition of an individual it could try and punish, or the littoral state yields jurisdiction to the flag state where an offense is committed by a member of the crew of a warship or merchantman in a foreign port in circumstances in which the littoral state would admittedly have a prior claim to jurisdiction.

² Article 32, *Vienna Convention on Diplomatic Relations*, April 18, 1961; Article 26, *Draft Convention on Diplomatic Privileges and Immunities*, Harvard Research, 26 A.J.I.L. (Supp.) 125 (1932).

³ *Wilson v. Girard*, 354 U.S. 524 (1957); *Chung Chi Cheung v. The King* [1939], A.C. 160 (P.C.); *Gounaris v. Ministere Public*, Mixed Court of Cassation, Egypt, 1943, [1943-1945] Ann. Dig. 152 (No. 41); 1 Hyde, *International Law* 819 (2d ed., 1945).

⁴ Par. 12, pp. 16-17.

⁵ Article VII, 3(c) provides that where the right to exercise jurisdiction is concurrent, "If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other States for a waiver of its right in cases where the other State considers such waiver to be of particular importance."

⁶ Waiver by the sending and by the receiving State were treated separately in the earlier drafts, and the sentence enjoining sympathetic consideration

agreements provide for waiver in comparable terms,⁷ except that where the United States has exclusive jurisdiction, waiver only by the United States is, of course, contemplated.⁸

In the past, it has been the general practice of the United States, as a sending state, to ask for a waiver in all cases in which the receiving state has primary jurisdiction.⁹ It has in addition negotiated bilateral agreements with the Netherlands and Greece¹⁰

for a requested waiver was added first to the provisions relating to waiver by the sending state. MS-D(51)11. The Norwegian representative later noted that "Such a proviso would facilitate the adoption of the final document by the respective Parliaments." MS-(J)-R(51)5. The provisions were combined and the "sympathetic consideration" sentence made applicable to both, in MS-D(51)11—2d Revise.

⁷ See Article XVII, 3(c) of the Japanese Agreement and the Agreed Minutes regarding 3(c); Article 2, 4(c) of the Iceland Agreement; Article XIII, 3 and 4 of the Philippines Agreement; Article 8, (3) (c) of the Australian Agreement. See also Article V, (4) (c) of the Bahama Islands Agreement regarding waiver by the United States. The Bahama Islands Agreement differs because where there is concurrent jurisdiction the concept of primary and secondary jurisdiction is not used, the Agreement simply providing that "the case shall be tried by such court as may be arranged between the Government of the Bahama Islands and the United States authorities."

⁸ See Article XVII, 3 of the Ethiopian Agreement and Article VIII of the Agreement with Denmark regarding Greenland. See also Article 6, 4, of the superseded Convention with West Germany, and Article XX, (2) of the Libyan Agreement. Neither the Korean Agreement nor the expired Dominican Agreement refers specifically to waiver.

⁹ The U.S. authorities in Italy were given authority to exercise discretion in requesting waivers in minor cases, with the result that the waiver rate increased from 14 to 20 per cent. Hearings Before the Subcommittee of the Senate Committee on Armed Services On Operation of Article VII, NATO Status of Forces Treaty, 87th Cong., 1st Sess., 26 (1960). The United States has, conversely, waived its primary jurisdiction in cases of multiple offenders in order to make possible a single prosecution.

¹⁰ Paragraph 3 of the Annex to an Agreement of August 13, 1954 with the Netherlands provides that "The Netherlands authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States Military law are concerned, will, upon request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities." The Netherlands in the period from Dec. 1, 1959 to Nov. 30, 1960 waived jurisdiction in all the 171 cases which arose. Hearings Before a Subcommittee of the Senate Committee on

and with Libya¹¹ designed to make waiver by those governments the norm, to be granted in all except the unusual case. The Agreement with West Germany carries this approach a step further, providing for a blanket waiver of West German jurisdiction on application of the sending state, which West Germany may recall in special cases.¹² The concept of waiver has in this Agreement shifted almost 180 degrees, since the sending state which requests a blanket waiver has primary jurisdiction in all cases, subject only to an option in the receiving state, West Germany, to reassert its jurisdiction in a particular case.

Receiving states have waived jurisdiction admittedly theirs over members of the American forces in some two-thirds of all

Armed Services, Operation of Article VII, NATO Status of Forces Treaty, 87th Cong., 1st Sess., 25 (1961).

Article II, 1, of the Agreement with Greece of September 7, 1956, is substantially the same as the provision in the Agreement with the Netherlands. Greece in the period from Dec. 1, 1959 to Nov. 30, 1960, waived jurisdiction in all but three of 30 cases. *Id.*, p. 24.

The Agreement with the Federation of the West Indies provides, in Article 9(3)(c), that: "The authorities of the Territory will waive, upon request, their primary right to exercise jurisdiction * * * except where they in their discretion determine and notify the United States authorities that it is of particular importance that such jurisdiction be not waved."

¹¹ " * * * [T]he Government of the United Kingdom of Libya * * * henceforth undertakes to waive its criminal jurisdiction in relation to members of the United States forces under the terms of the Agreement except in the case of an offense * * * which is considered by the Government of the Kingdom of Libya to be of particular importance to the United Kingdom of Libya such as an offense against the safety of the Libyan state, an offense against the sovereignty or honor of the Libyan state, or an offense which the Libyan state considers to be of serious public concern, including sexual offenses which cause serious public concern. It is understood with respect to a case involving such an offense which is considered of particular importance to the United Kingdom of Libya that the Libyan authorities taking into account the spirit of cooperation expressed in Article XX of the Agreement, will in the course of appropriate consultations between the Libyan authorities and the United States military authorities give sympathetic consideration to a request from the United States authorities for a waiver of the jurisdiction of the Libyan authorities in such a case. * * *"

¹² Article XIX of the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, etc.; Agreed Minutes Re Article XIX, Protocol of Signature to the Supplementary Agreement, Aug. 23, 1959.

See also Articles 3g, h, i and j, 4 and 8 a of Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain.

cases.¹³ This is the average, world-wide. In some countries, the figure approaches 100% ;¹⁴ in others it is much lower ;¹⁵ in some, it is zero.¹⁶ The significance of the number of waivers granted by

¹³ For the year from Dec. 1, 1954 through Nov. 30, 1955, there were 10,249 offenses committed by those subject to U.S. military law over which receiving states had jurisdiction. Waivers were obtained in 6,769 cases, or 66.04 per cent of all cases. Hearings Before the House Committee on Foreign Affairs on H.J. Res. 309, Part II, 84th Cong., 2d Sess., 562 (1956). The experience in other years has been similar. That waivers were not obtained in the other cases does not, of course, mean that 3480 Americans were imprisoned. Charges were dropped in 274 cases; there were acquittals in 225 others. Fines only were imposed in 2595 cases. Sentences to confinement were imposed in only 266 cases, and in all except 120 the sentences to confinement were suspended. *Ibid.*

"During the period December 1, 1958, through November 30, 1959, 12,909 U.S. personnel were charged with offenses subject to the primary or exclusive jurisdiction of foreign courts throughout the world (9,355 of these offenses were traffic offenses). Foreign authorities waived jurisdiction in 8,060, or 62.43 percent, of these cases and tried 4,070 cases (2,720 of which were traffic violations). In the remaining cases the charges were dropped or remained pending at the end of the reporting period. Foreign courts acquitted 214 individuals, an overall acquittal rate of 5.25 percent, imposed reprimands or fines only in 3,608 cases, and confinement in 248 cases. Confinement was suspended in all but 100 of the cases in which confinement was adjudged. There was no sentence, including indeterminate sentences, which exceeded 10 years." Brig. Gen. Decker, Hearings Before the Subcommittee of the Senate Committee on Armed Services, *supra*, note 9, at 13. For the period December 1, 1959, through November 30, 1960 foreign authorities waived jurisdiction in 6,125 or 58.33 percent of 11,516 cases. Brig. Gen. Todd, Hearings Before the Subcommittee of the Senate Committee on the Armed Services, *supra*, note 10, at 14.

It is interesting that in the same period foreign authorities waived jurisdiction in 399 of 517 cases involving civilians and in 375 of 499 cases involving dependents, although the cases of *Kinsella v. Singleton*, 361 U.S. 234, *Gresham v. Hagan*, 361 U.S. 278, and *McElroy v. Guagliardo* and *Wilson v. Bohlander*, 361 U.S. 281, were decided on January 18, 1960, early in the period. *Id.* at 3.

¹⁴ During the same period, Dec. 1, 1959 to Nov. 30, 1960, Japan waived in 2,094 of 2,797 cases; France in 3,358 of 3,939 cases. *Id.* at 26, 24.

¹⁵ During the same period, Dec. 1, 1959 to Nov. 30, 1960, Canada waived in only 25 of 358 cases; Panama tried 150 of 171; the United Kingdom 1,668 of 1,946; Iceland granted waivers in only 3 of 268; the West Indies in only 15 of 305. *Id.* at 24, 28, 25, 26, 27.

¹⁶ During the same period, Dec. 1, 1959 to Nov. 30, 1960, Turkey waived in no cases of 50. *Id.* at 25. It is understood the Turkish authorities take the position that no Turkish official is authorized by law to waive jurisdiction. Morocco at one time refused to grant waivers, but in the period Dec. 1,

a particular country must, of course, be read with the provisions of the agreement with that country in mind. One would not expect as high a percentage of waivers in, say, the Phillippines, where the United States has jurisdiction over all on-base offenses, as in France, where it has primary jurisdiction over only *inter se* and duty-connected offenses. Over all, it seems probable that most offenses are subject to the primary jurisdiction of the receiving state, so that, with waivers normally granted in two-thirds of the cases, waiver has assumed a major role.

It has been argued that according so large a role to waiver is undesirable; that discretion, subject to influence by many considerations, has been substituted for the rule of law.¹⁷ Perhaps there is merit to this view since the high percentage of waivers suggests that the allocation of jurisdiction in the various agreements may not represent solely a realistic balancing of the national interests involved. Put another way, it suggests that receiving states are in fact prepared to admit that the interests of a sending state in maintaining discipline and control over its forces outweighs those of the receiving state in maintaining the public order in its territory in more cases than the status of forces treaties recognize, e.g., in the NATO countries, in more than *inter se* and duty-connected cases. The difficulty, of course, is in formulating additional rules where the considerations involved are so numerous and subtle.

The supplemental bilateral agreements with the Netherlands ¹⁸

1959 to Nov. 30, 1960 it waived jurisdiction in 3 of 36 cases. *Id.* at 27.

¹⁷ "There are undeniable advantages in the arrangements, generally of an informal nature, which permits such waivers. Were the attempts to be made to place these arrangements on a formal basis, whether in the form of an agreement or otherwise, it is quite possible that less might be secured by way of waivers than is now accomplished on a case-to-case basis. On the other hand, these waivers *ex gratia* by receiving states are subject to all of the vicissitudes of domestic politics. If the strength of public opinion makes itself felt in a particular case, jurisdiction over that particular case may not be granted to the sending state. Public emotion, newspapers, domestic politics, a sudden outburst of feeling against a particular foreign nation may thus influence a state to depart from its usual practice of waiving jurisdiction * * *." Baxter, "Jurisdiction over Visiting Forces and the Development of International Law," *Am. Soc'y Int. L. Proc.*, 1958, 174 at 177-178. But see the comments of Mr. Evans, Mr. Leigh, Prof. Snee and Mr. Menne, *id.*, pp. 182-183; 186-187; 188-189; 191.

¹⁸ *Supra*, note 10.

and Greece,¹⁹ in a sense do no more than shift the burden of proceeding to the receiving state. The phrase used in both, "except where they [the authorities of the receiving state], determine that it is of particular importance that jurisdiction be exercised" is not a definitive guideline. The supplemental agreement with Libya²⁰ reflects an effort to define by illustration the unusual case, in terms of the nature of the offense. The language is "such as an offense against the safety of the Libyan State, an offense against the sovereignty or honor of the Libyan State, or an offense which the Libyan State considers to be of serious public concern, including sexual offenses which cause serious public concern." This approach is carried further in the supplemental agreements with West Germany. Article 19 of the Agreement to Supplement the [NATO] Agreement²¹ refers only to cases "Where the competent German authorities hold the view that, by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction." The Protocol of Signature²² is more specific, referring to offenses against the state and killing, robbery and rape, and attempts to commit such offenses.²³ There is precedent for this approach,²⁴ but its potential should not be overestimated. A receiving state may have a special interest not only in crimes against its security and major crimes of violence, but also in violations of its economic laws and in such

¹⁹ *Supra*, note 10.

²⁰ *Supra*, note 11.

²¹ *Supra*, note 12.

²² *Supra*, note 12.

²³ The provisions of the Agreed Minutes and Declarations Re Article 19 refer "in particular" to

"(i) offenses within the competence of the Federal High Court of Justice (Bundesgerichtshof) in first and last instance or offences which may be prosecuted by the Chief Federal Prosecutor (Generalbundesanwalt) at the High Federal Court of Justice;

"(ii) offences causing the death of a human being, robbery, rape, except where these offenses are directed against a member of a force or of a civilian component or a dependent;

"(iii) attempt to commit such offences or participation therein."

²⁴ "The offenses of murder, manslaughter, and rape shall be tried only by the criminal courts of the United Kingdom." Art. 2, Annex III, British-Czechoslovak Military Treaty of October 25, 1940, quoted in Schwelb, "The Jurisdiction over the Members of the Allied Forces in Great Britain," *Czechoslovak Year Book of International Law*, 147 at 156, March, 1942.

minor crimes as traffic offenses. Moreover, a particular class of offenses may interest different states to a different degree, or the same state to a different degree at different times. A state's interest in punishing violations of its exchange control laws may, for example, vary depending on the condition of its balance of payments.

Other approaches are possible. Jurisdiction could be allocated in part on the basis of rank. It may be said this is undemocratic. Where, however, the basis for the sending state's claim to jurisdiction is military exigency, rank may be relevant and the democratic principle is not in fact involved. Rank is after all a determining factor where diplomatic immunities are concerned. Only those having diplomatic rank are clearly entitled to complete immunity; the members of the administrative and technical staff, and of the service staff, of a mission, and consuls, may have only a qualified immunity or no immunity.²⁵

It may be that, as experience accumulates, a common law of waiver will develop which can serve as a basis for the formulation of new treaty rules. These rules should not, however, be too vague, nor should the procedure for deciding which state has jurisdiction under the rules be too complex. The first invites controversy, the second delay, which minimizes the effectiveness of trial and punishment by either state. Moreover, it seems unlikely that renegotiating our existing agreements would, in general, increase the number of cases over which the United States, as a sending state, now in fact exercises primary jurisdiction.

²⁵ See Chapter II, *supra*.

CHAPTER XIII

ENFORCEMENT

The military authorities of a visiting armed force must necessarily have the power to exercise enforcement jurisdiction in the receiving state. This generalization by no means implies, however, that they must have all the many powers which a state may exercise in its own territory. A state, in the ordinary enforcement of its criminal law, may, anywhere in its territory, through its police, conduct investigations, make arrests, and hold individuals in custody. A state may try an accused and, in that connection, summon witnesses and punish those who fail to appear, refuse to testify, or give false testimony. Those who participate in the trial can be protected against claims for or charges of defamation. If the accused is convicted, a sentence may be imposed and carried out. A state may, in general, exercise these powers with respect to any person found in its territory, subject only to the limitations imposed by its constitution and by denial of justice doctrines.

International law, in the absence of treaty, hardly accords the panoply of such powers to the military authorities of the sending state. Nor does it necessarily deny all of them to the receiving state, even if the visiting forces are in general immune from its jurisdiction.¹ This is, moreover, a peculiarly sensitive area. Military police of a foreign state, operating in a receiving state, represent a visible, tangible encroachment on the receiving state's "sovereignty," even if they exercise power only over members of the visiting force. If they exercise power over a national of the receiving state, resentment is inevitable. Conversely, the incidents that attend the arrest, interrogation and confinement of a member of the visiting force by the local authorities may peculiarly arouse the resentment of the sending state and its citizens.

The police of a visiting force may not exercise their powers

¹ *Supra*, p. 92; 130 et seq.

within the receiving state without its consent, express or implied. Consent to the presence of a visiting force does not necessarily imply permission for its police to exercise their powers, e.g., permitting the crew of a warship to come ashore does not necessarily imply permission for the landing of a shore patrol.² Such consent may imply permission for the police of the force to operate within a base (as they may on a warship in a foreign port) or where the forces are engaged in actual military operations. It does not necessarily imply permission for the police to operate elsewhere in the receiving state, or to exercise power over anyone not a member of the force, except possibly on a base or where the forces are engaged in actual military operations.

Courts-martial of a sending state may certainly sit in the receiving state and try an accused member of the force. They can summon members of the force as witnesses, and punish them for contempt or perjury. They quite clearly cannot exercise such power with respect to those not members of the force. Presumably, the sending state can carry out a sentence of imprisonment or, perhaps, execution on a base or where the force is engaged in actual military operations; perhaps it cannot do so elsewhere in the receiving state.

Presumably the police of the receiving state can arrest and hold in custody a member of the visiting force for any offense for which they can try and punish him. Probably they can also take any reasonable steps to restrain him when he is in the act of committing a crime. It may be, however, that they can do none of these on a base—the analogies of the inviolability of an embassy and of a warship are relevant here—or where the force is present as a force, in actual military operations.

These general conclusions are necessarily tentative. Authority is too sparse and inconclusive to give clear answers. Also here as elsewhere varying circumstances may suggest different conclusions on some or all of the problems.

The post-World War II agreements to which the United States is a party have dealt more or less comprehensively with these problems. The agreed solutions have varied here as they have in other areas.

² Article 0625, U.S. Navy Regs., *supra*, p. 75, n. 35.

POLICE POWER

The NATO Agreement is both less than precise and less than comprehensive with respect to enforcement jurisdiction.

The sending state has the right "to police any camps, establishments, or other premises which they occupy" by agreement, and its military police "may take all appropriate measures to ensure the maintenance of order and security of such premises."³ But "outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force."⁴ There is no express provision on the question of whether the police of the sending state may arrest one not a member of the visiting force for an offense on a base. Perhaps the general grant to "take all appropriate measures" on a base is qualified by the blanket provision denying the sending state any right to exercise jurisdiction over other than members of the force.⁵

The right of the police of the receiving state to arrest members of the visiting force is recognized in the provision that "the authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents * * *."⁶ It is implicit in the provision that "The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or dependent."⁷ The phrase "assist each other" is less than clear. Neither provision sets any limitation on the power to arrest, as on a base.⁸

³ Article VII, 10(a).

⁴ Article VII, 10(b).

⁵ Article VII, 4.

⁶ Article VII, 5(a). Article 6(c) provides that "the authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence * * *."

⁷ Article VII, 5(b).

⁸ The Agreement with Iceland varies just enough from the NATO Agreement, with regard to enforcement, to raise further troubling doubts. Thus, in Article 2(10), the military police of the United States are given authority outside the agreed areas "subject to arrangements with the authorities of Iceland and jointly with those authorities." In the NATO Agreement the language is not "jointly with" but "in liaison with."

The Agreed Minutes which supplement the arrangement with Japan clarify and implement the provisions relating to police power. The American authorities have exclusive power to arrest within facilities and areas in use and guarded by our forces, subject only to the power of the Japanese police to arrest with American consent or when in pursuit of a flagrant offender. The United States undertakes also to arrest, within such facilities and areas, those not subject to its jurisdiction whose arrest is requested by the Japanese. In addition, the United States authorities may arrest in the vicinity of such facilities and areas those committing an offense against their security. The United States authorities are required immediately to turn over to the Japanese authorities those not subject to American jurisdiction.⁹ There are no implementing provisions regarding the power to police outside such facilities and areas.

The Agreement with West Germany goes much further in clarifying and implementing the NATO provisions. The Article dealing with jurisdiction within an "accommodation" is not precise; it seemingly recognizes the power to police of the sending state, but the power is not exclusive.¹⁰ The right of the police of the visiting force to patrol "on public roads, on public transport, in restaurants (Gaststätten) and in all other places to which the public has access and to take such measures with respect to the members of a force, of a civilian component or dependents as are necessary to maintain order and discipline" is expressly affirmed.¹¹ The right of the authorities of the sending state to arrest a person not subject to their jurisdiction, if he is caught or pursued *in flagrante delicto*, or has committed or is attempting to commit an offense within or directed against an installation of the sending state, is recognized, subject to detailed safeguards.

⁹ Agreed Minutes re paragraphs 10(a) and 10(b), 1. The Japanese agree also not normally to exercise the right of search, seizure or inspection within the facilities and areas, nor with respect to property of the United States armed forces, wherever situated. Whenever such search, seizure or inspection is desired by the Japanese authorities, the United States is committed to undertake it upon request. Agreed Minutes re paragraph 10(a) and 10(b), 2.

¹⁰ Article 53.

¹¹ Article 28. The military police are required, where public order and safety are endangered or disturbed by an incident involving members of a force, etc., to take measures to maintain or restore order or discipline, if so requested by the German authorities.

The person taken into custody must be delivered to the German authorities without delay.¹²

The other agreements to which the United States is a party vary over a wide range. The American forces in Korea are immune from arrest by the local authorities "in view of prevailing conditions, such as the infiltration of North Koreans into the territory of the Republic, United States forces cannot be submitted, or instructed to submit, to the custody of any but United States forces." The United States authorities can, on the other hand, arrest Korean nationals "detected in the commission of offenses against the United States forces or its members," but must of course deliver them to the Korean authorities "as speedily as practicable." The Agreement with Denmark on Greenland apparently is to the same effect, within those defense areas for which the United States is responsible.¹³ At the other extreme, the Agreement with Saudi Arabia apparently contemplates that Dhahran Airfield be patrolled by Saudi Arab guards, accompanied by Americans, and that the Saudi Arabs have power to arrest there, as they expressly do in the remaining areas to which Americans may go.¹⁴

The Agreement with Ethiopia gives the United States exclusive authority to make arrests, including arrests of Ethiopian nationals, within the Installations occupied by the United States.¹⁵ It may exercise police powers outside the Installations "by arrangement" with the Ethiopian authorities.¹⁶ The Ethiopian authorities may arrest members of the United States forces "outside

¹² Article 20. The Convention with West Germany was, of course, much more favorable to the sending state regarding the exercise of the power to police. Members of a force were immune from arrest by the German authorities, although they could be taken into custody, and searched in certain cases, e.g., when apprehended *in flagrante delicto*. Authorities of a force could arrest members of a force, and also those subject to German jurisdiction in certain cases, e.g., within an installation. See generally Article 7.

¹³ Article VIII.

¹⁴ Paragraphs 12 and 13.

¹⁵ That the United States authority to arrest is exclusive is implicit in Article XVII, 6: "The United States authorities shall deliver to the Ethiopian authorities for trial and punishment all Ethiopian nationals and other persons normally resident in Ethiopia who have been charged by the Ethiopian or the United States authorities with having committed offenses within the limits of the Installations." Article XVII, 7, gives the United States power "to police the Installations and take appropriate measures" etc.

¹⁶ Article XVII, 8.

the Installations for the commission or attempted commission of an offense.”¹⁷ The Agreement with Libya, although in general modelled on the NATO Agreement, is, with respect to the power to police, much like the Ethiopian Agreement.¹⁸

The Agreement with the Philippines is explicit that only the United States may exercise the power to police on a base,¹⁹ except with the permission of the commanding officer. There is no provision expressly authorizing the United States to exercise the power to police outside a base, nor for the Philippine authorities to arrest a member of the American forces outside a base, but both powers are implied.²⁰

The revised Leased Bases Agreement gives the United States the exclusive right to arrest members of the United States forces and United States nationals subject to United States military law in a leased area;²¹ it does not deny the right of the local govern-

¹⁷ Article XVII, 5.

¹⁸ Article XX(8), which gives the United States power to police the agreed areas and maintain order therein, adds the clause: “[A]nd may arrest therein any alleged offenders and, when they are triable by the Libyan courts, will forthwith turn them over to the Libyan authorities for trial.” This strongly suggests the United States power to police the agreed areas is exclusive, even though under Article XX(3) “The United States and Libyan authorities will assist each other in the arrest and handing over to the appropriate authority of members of the United States forces” etc.

¹⁹ Article XIV. This is implicit also in Article XIII, 7, in which the United States agrees not to grant asylum in a base to any person fleeing Philippine jurisdiction. The commanding officer must, under Article XIV, on request arrest an offender against Philippine law, where the Philippines have jurisdiction, and surrender him to the Philippine authorities.

²⁰ Article XIII, 1, 3, and 4.

²¹ Article VI of the Leased Bases Agreement of March 27, 1941 was not changed when the provisions on jurisdiction were amended. Paragraph (2) of Article VI is an agreement of the Government of the Territory to give reciprocal facilities for the arrest and surrender of offenders. This hardly implies that the United States may not arrest members of the American forces outside a base, though presumably that requires a separate arrangement with the local authorities.

Article IX(12) of the Agreement with The Federation of the West Indies gives the United States express power to “police the defence areas” and to “take all appropriate measures to ensure the maintenance of order and security within such defence areas.” It is not stated that these powers are exclusive, nor is it expressly stated that the powers granted include the power to arrest others than members of the United States Forces, although the language used is broad enough to extend to that power. This interpreta-

ment to arrest others in a Leased area, nor contain any other provisions on the power to police. The Dominican Agreement, on the other hand, implicitly recognized the right of the United States to arrest anyone on a "Site" but otherwise referred only to assistance by the Dominican authorities in arresting offenders subject to American jurisdiction.

From this review it is apparent that all the agreements, including the NATO Agreement, deal only partially with the problem of the power to police of the sending and receiving states. They leave much to implication or to customary law, and much to implementation by supplemental agreements and municipal legislation. Even their explicit provisions show no common pattern. The only generalizations that seem permissible are that a distinction is made between the power to police on and off a base, and between the power to arrest members of a force and nationals or residents of the receiving state.

CUSTODY

Custody of the accused pending disposition of the charges against him is, from one point of view, a detail. No jail is, however, a pleasant place to be, and in a situation where emotions are so easily aroused, that a national and particularly a member of the armed forces of one state is held in the jail of another state can trouble international relations. Custody is at the same time not a necessary concomitant of jurisdiction to try and punish. There is, in brief, room for accommodation here without sacrifice of any major principle.

It would seem that, in the absence of agreement, a state which took an individual into custody could retain custody if it had jurisdiction, concurrent or exclusive, to try and punish him. Normally, of course, a state does not take an individual into custody unless it has such jurisdiction, but it may as a preventive

tion is reinforced by the broad grant of powers to the United States in Article II.

Clauses (5) (a) and (5) (b) of Article IX make it clear that either the authorities of the Territory or the military authorities of the United States may arrest members of the United States Forces, at least outside the "defence areas."

Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain expressly recognizes the right of both the Spanish authorities and the United States military authorities to arrest members of the United States Forces, without express limitation as to place. See Articles 3, 3j and 7.

measure or by arrangement with another state. The problem is further complicated when the concept of primary and secondary jurisdiction is introduced.

The same clause of the NATO Agreement which directs the authorities of both states to assist each other in making arrests, directs such assistance "in handing them over to the authority which is to exercise jurisdiction * * *."²² This is qualified, however, by the provision that "The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State."²³ The sending state may, in brief, request custody of the accused only if it has exclusive or primary jurisdiction to try; it may retain custody where the receiving state has such jurisdiction to try, but may not ask custody as a matter of right.²⁴

Agreements supplemental to the NATO Agreement have been made with the Netherlands and with Greece varying the NATO arrangements regarding custody where the receiving state has jurisdiction. The Netherlands Agreement gives the United States custody "pending trial";²⁵ that with Greece "pending completion of trial proceedings."²⁶ Under the more detailed provisions of the 1963 Agreement with West Germany,²⁷ the sending state may

²² Article VII, 5(a).

²³ Article VII, 5(c). As to the possible meanings of the word "charged" under the law of the several NATO members, see Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction*, 92-93 (1957).

²⁴ While neither of the provisions imposes an explicit obligation on the sending state to take a member of its force into custody for a violation of local law, nor to keep him in custody if he has been arrested, nor to keep him in the receiving state, these are generally considered to be implicit obligations.

The Agreement with The Federation of the West Indies contains, in Article IX, (5) (a) and (5) (b), provisions comparable to those found in the NATO Agreement, but adds the sentence: "In cases where the United States authorities may have the responsibility for custody pending the completion of judicial proceedings, the United States authorities shall, upon request, make such a person immediately available to the authorities of the Territory for purposes of investigation and trial and shall give full consideration to any special views of such authorities as to the way in which custody should be maintained."

²⁵ Paragraph 3 of the Annex.

²⁶ Article III.

²⁷ Article 22.

in general retain or request custody, except where the offense is "directed solely against the security of the Federal Republic," until release, acquittal or commencement of the sentence. The sending state is expressly obligated to make the accused "available to the German authorities for investigation and criminal proceedings."²⁸ The Agreed Minutes supplementing the arrangement with Japan provide that where Japan has primary jurisdiction "The Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter."²⁹ The Philippines Agreement similarly gives the United States custody, but "pending trial and final judgment";³⁰ that with Libya provides that "The Libyan authorities will, if the United States authorities request the release on remand of an arrested member of the United States forces, release him from their custody on the United States authorities' undertaking to present him to the Libyan courts for investigatory proceedings and trial when required."³¹ There are, of course, no comparable provisions, other than those simply calling for surrender of an arrested member of the American forces, in those agreements, e.g., with

²⁸ The Supplemental Agreement with the Netherlands imposes a comparable commitment; that with Greece simply states that "Custody of the accused shall be maintained in Greece."

²⁹ Re paragraph 5.

³⁰ Article XIII, 5. The commanding officer is required to "acknowledge in writing that such accused has been delivered to him * * * and that he will be held ready to appear and will be produced before said court when required by it."

³¹ Article XX(3). Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain provides that the United States will, upon request, be given custody of a member of the United States Forces arrested by the Spanish authorities (Article 3 (a), (b), (c), (d) and (e)) and that the United States shall retain custody of a member of the United States Forces arrested by United States authorities. (Article 3j). If the Spanish authorities are to exercise jurisdiction, custody "shall remain with the United States authorities until such time as the trial is concluded and the sentence pronounced. The United States authorities shall accept the responsibility of assuring the presence of the offender at the appointed time of trial." Article 8(c).

Saudi Arabia and Ethiopia, under which the United States has exclusive jurisdiction.

The agreements cited display an increasing tendency to treat custody as a separate issue from jurisdiction, and to permit the sending state to have custody of an accused member of its forces even when he has been arrested by the receiving state for an offense as to which the receiving state has primary jurisdiction. It is submitted that, since permitting the sending state to have custody in no way prejudices any significant interest of the receiving state and can minimize international friction, it has obvious merit.

WITNESSES

The right of courts-martial of sending states to sit in the receiving state is clear.³² The courts-martial may, of course, compel members of their forces to appear as witnesses and testify. The NATO Agreement does not, however, contain any express provision for compulsory process to compel the attendance of nationals of the receiving state as witnesses before a court-martial, although a general provision requires reciprocal assistance "in the collection and production of evidence."³³ The negotiators contemplated that under this provision receiving states would be obligated to compel the attendance of their nationals.³⁴ Only the United States³⁵ and the United Kingdom³⁶ have, however, implemented the obligation.

Where a member of a visiting force is tried in a court of the receiving state he is, on the other hand, entitled "to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving state."³⁷ The receiving state can in ordinary course summon members of the visiting force as well as its own nationals, though it may need the as-

³² Article VII, 1(a) of the NATO Agreement provides that "[T]he military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State." See p. 88, *infra*.

³³ Article VII, 6(a).

³⁴ Snee and Pye, *op. cit. supra*, note 22, at 95.

³⁵ Service Courts of Friendly Foreign Forces Act, 22 USC 703.

³⁶ Snee and Pye, *op. cit. supra*, note 22, at 97.

³⁷ Article VII, 9(d).

sistance of the commanding officer to effect service on a base.³⁸ Paradoxically, then, a member of a force may be more effectively protected in this regard when tried by a foreign court than when tried by a court-martial.

The Agreement with West Germany reaffirms the obligation of the sending state to compel a member of its force or civilian component to appear before a German court.³⁹ More important, it imposes on Germany the express obligation to secure the attendance of witnesses before courts-martial "in accordance with German law."⁴⁰ The Agreement with Iceland adds comparable commitments to the NATO provisions.⁴¹ The Libyan Agreement, which follows the language of the NATO Agreement in many provisions, adds to the paragraph modelled on Article VI(a) relating to reciprocal assistance "in the collection and production of evidence," the words "including the attendance of witnesses at the trial."⁴² The Agreement with Ethiopia imposes the reciprocal obligations in more explicit language.⁴³ The Agreement with the Dominican Republic, on the other hand, was less explicit even than the NATO Agreement⁴⁴ and the revised Leased Bases Agreement is, in this regard, vague.⁴⁵ Other agreements, e.g.,

³⁸ Snee and Pye, *op. cit. supra*, note 22, at 94. Compelling a member of the American forces to appear as a witness in a foreign court in which he may not be protected against self-incrimination raises difficulties. *Id.*, at 98 *et seq.*

³⁹ Article 37, 1(a). The obligation with respect to dependents is qualified by the phrase "insofar as the military authorities are able to secure their attendance." Article 37, 1(b).

⁴⁰ Article 37, 2.

⁴¹ Article 2, 7(b).

⁴² Article XX (4).

⁴³ Article XVII, 4.

⁴⁴ Article XV. The reciprocal obligations are phrased in terms only of "the collection of evidence"—but not its production—and "the seizure and in proper cases the handing over of exhibits and all objects connected with the offense."

⁴⁵ Article VI, Leased Bases Agreement of March 27, 1941, denies to the Territory the right to serve process—defined to include a summons, subpoena, warrant, writ or other judicial document for securing the attendance of a witness—on a base without the permission of the commander, but imposes on the commander the obligation to serve the process. The Article then provides that where the courts (only civil ?) have jurisdiction, the Territory "will on request give reciprocal facilities as regards the service of process," which may or may not include service on a local national. See also Article IV (4).

The Agreement with the Federation of the West Indies makes no reference

those with Saudi Arabia, Denmark regarding Greenland, and Korea, make no reference whatever to the problem.

Some, though not all recent agreements, have made more explicit than does the NATO Agreement the obligations of the sending and receiving states with respect to compelling the attendance of witnesses before the other's tribunals. Requiring such assistance, particularly by the receiving state when the sending state is exercising jurisdiction, does raise an issue of policy. So long, however, as the assistance is in the form of using the receiving state's own process to compel attendance, the advantage to the receiving state from the trial and punishment of offenders would seem to outweigh the disadvantages. Only two agreements, apparently, go farther, and deal specifically with the matters of contempt and perjury.⁴⁶ Only the Agreement with West Germany refers to the immunity of participants in a trial.⁴⁷

CIVIL RIGHTS OF THE ACCUSED

The NATO Agreement contains only two provisions which relate to the rights of a member of a visiting force against the sending state. One is that a death sentence shall not be carried out in the receiving state if its legislation does not provide for such punishment in a similar case.⁴⁸ The provision, for which there are precedents,⁴⁹ reflects a compromise prompted by the antipathy of many NATO members toward capital punishment. The second, a qualified double jeopardy provision, provides that one tried and acquitted or punished by one state may "not be tried again for the same offence within the same territory by the authorities of another Contracting Party."⁵⁰ Normally, of course, this is more restrictive vis-à-vis the receiving than the sending state. Moreover, an exception makes the restriction inapplicable to trials by the military authorities of the sending state "for any violation

to the "defence areas" as such in this connection, but simply provides, in Article IX (6) (a) that: "To the extent authorized by law, the authorities of the Territory shall assist each other in the carrying out of all necessary investigations into offences, in providing for the attendance of witnesses, and in the collection and production of evidence * * *."

⁴⁶ Article XVII, 9 of the Ethiopian Agreement and Article XX (7) of the Libyan Agreement.

⁴⁷ Article 39.

⁴⁸ Article VII, 7 (a).

⁴⁹ *Supra*, p. 129.

⁵⁰ Article VII, 8.

of rules of discipline.” There is no provision requiring trial in the vicinity of the crime, for which there is also precedent.⁵¹ The provision, where it has appeared, was seemingly motivated by a desire to protect the interests of the receiving state and its nationals rather than those of the accused.

The Japanese, Icelandic, Australian, and Federation of the West Indies Agreements also contain the restriction with respect to the death penalty. No other agreement does. The Icelandic Agreement varies the double jeopardy provision by making it applicable only to Iceland. The revised Leased Bases Agreement makes the defense unavailable where a civil court of the Territory and a United States court-martial have jurisdiction, but the court conducting the second trial is directed to take into account any punishment previously awarded.⁵² Several agreements include restrictions on the place of trial. The Agreed Minutes supplementing the Japanese arrangements require that in certain cases the trial “shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon.”⁵³ The Convention with West Germany provided that where an offense was against “German interests” the trial had to be held within the Federal territory except in cases of military exigency.⁵⁴ The Agreement with West Germany has a comparable provision.⁵⁵ The Agreement with Ethiopia is unique in that it requires trial “within the installations or outside Ethiopia.”⁵⁶

In general, then, subject to these limited restrictions in some receiving states, the civil rights of an accused, tried by a court-martial of the sending state, depend on that state’s law only.

The civil rights of a member of a visiting force tried by a court of the receiving state depend on the law of that state, international law, and the terms of any applicable treaty. They depend in no way on the law of the sending state, which governs

⁵¹ *Supra*, p. 130, n. 51; 134.

⁵² Article IV, (5) (b). In the unlikely event that the offence is within the jurisdiction of a civil court of the Territory and a civil court of the United States, trial by one excludes trial by the other. Article IV, (5) (c). The Agreement with the Federation of the West Indies, in Article IX (8), reverts to the NATO pattern.

⁵³ Re paragraph 3 (c), 2.

⁵⁴ Article 8, 4.

⁵⁵ Article 26.

⁵⁶ Article XVII, 4.

only the rights of an accused person with respect to acts of that state.

Whether members of the American forces, tried in foreign courts, would be accorded adequate protection has, quite properly, caused much concern. The NATO Agreement enumerates a significant list of rights to which the accused, whether a member of a force or of the civilian component or a dependent, is entitled.⁵⁷ The Agreed Minutes supplementing the arrangements with Japan add others,⁵⁸ as does the Agreement with Libya⁵⁹ and that with Spain.⁶⁰ Other agreements, including of course

⁵⁷ Article VII, 9 reads:

Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving state;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

The Agreement with the Federation of the West Indies repeats the NATO list, in Article IX(9), but adds that the trial “shall be public except when the court decrees otherwise in accordance with the law in force in the Territory.” Article 8(9) of the Australian Agreement is substantially the same as Article VII, 9 of the NATO Agreement.

⁵⁸ Re paragraph 9. The added rights specifically stated are:

- (a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;
- (b) He shall enjoy the right to a public trial by an impartial tribunal;
- (c) He shall not be compelled to testify against himself;
- (d) He shall be permitted full opportunity to examine all witnesses;
- (e) No cruel punishment shall be imposed upon him.

⁵⁹ Article 20 (5).

⁶⁰ Procedural Agreement No. 16 to the 26 September 1953 Agreements with Spain lists the rights accorded by the NATO Agreement and (1) Pro-

those under which the United States has exclusive jurisdiction, make no reference to civil rights.

The Senate, in its resolution giving its advice and consent to the ratification of the NATO Agreement, stated it to be the sense of the Senate that:

“2. Where a person subject to the military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the Armed forces of the United States in such state shall examine the laws of such state with particular reference to the procedural safeguards contained in the Constitution of the United States;

3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3 (c) of Article VII (which requires the receiving state to give ‘sympathetic consideration’ to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives;

4. A representative of the United States to be appointed by the Chief of Diplomatic Mission with the advice of the senior United States military representative in the receiving state will attend the trial of any such person by the authorities of a receiving state under the agreement, and any failure to comply with the provisions of paragraph 9 of Article VII of the agreement shall be reported to the commanding officer of the armed forces of the United States in such state who shall then request the Department of State to take appropriate action to protect the rights of the accused, and notifica-

tection against an *ex post facto* law, (2) Protection against Bills of Attainder, (3) Have a public trial and be present at his trial, (4) Have the burden of proof upon the prosecution, (5) Be tried by an impartial Court and (6) Be protected from the use of a confession obtained by illegal or improper means.

tion shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

The Department of Defense has fully performed the mandate with which it was charged by the Senate, both within NATO member states and elsewhere. It has, in this connection, had to determine whether the standard of comparison should be the constitutional rights the accused would enjoy in a Federal court, or those he would enjoy in a state court, or those he would enjoy in a court martial. The Department of Defense has adopted the standard of the constitutional rights an accused would enjoy in a state court, although literally read, the mandate of the Senate apparently refers only to those he would enjoy before a court martial. Reports have been regularly made to the Armed Services Committees, and have consistently shown, with the rarest of exceptions, no violations of the rights of the accused. The laws of our allies have, in brief, adequately protected the rights of members of our armed forces brought before their courts for trial.

CHAPTER XIV

CONCLUSION

States have not in the past been willing, and are not now prepared, to accord visiting armed forces blanket immunity from their criminal jurisdiction, at least in time of peace, except in special circumstances. A receiving state violates no rule of international law in taking this position.

Since a state can deny to any other state the right to station armed forces in its territory, it can couple a grant of the right with the requirement that mutually satisfactory arrangements be made with respect to jurisdiction over the visiting forces. Controversy can arise, however, on the understanding to be implied when foreign troops are permitted to enter a state without an explicit agreement governing their status having been made. The sending state is, it seems clear, entitled to enforce its law through courts-martial sitting in the receiving state. To this end, the military authorities of the sending state may exercise a limited police power over the visiting forces and may summon members of the force as witnesses. Comparable powers may perhaps be exercised over civilians accompanying the visiting force and over dependents. The sending state has no such power with respect to others, except perhaps in extreme cases, e.g., in a combat zone in time of war. The receiving state has no, or at most a limited, supervisory jurisdiction over the visiting forces. The receiving state may, for example, have jurisdiction to decide whether the accused is in fact a member of the visiting force.

The receiving state, it seems equally clear, has concurrent jurisdiction over the visiting forces except perhaps in special circumstances. Put another way, no blanket immunity is to be implied from the grant of permission to station troops in the receiving state. The immunity may exist with respect to troops in passage, or in time of war in a combat zone. The immunity appears also to be recognized with respect to the crews of warships for acts which occur on board the warship, but not with respect

to armed forces on a base. Whether the immunity will be implied where the act was done in the performance of duty is unsettled. Where there is concurrent jurisdiction, international law provides no rule for resolving the conflict.

That there is so much doubt in this whole area is understandable. The sending state has an obvious interest in seeking to keep complete control over its armed forces at all times. The receiving state has an equally obvious interest in claiming concurrent jurisdiction. All of the considerations which support the territorial principle bolster the receiving state's claim. These considerations center around two basic ideas. One is the interest of the receiving state in protecting both the state and the lives and property of its citizens and residents. The other is that justice can be administered most effectively at the place of the crime. The weight to be given these conflicting interests can, of course, vary with the circumstances, and the circumstances in which armed forces are stationed abroad can and do differ over a very wide range.

All of this explains and justifies the recent practice of allocating jurisdiction over visiting forces by formal agreements. An agreement can both resolve the doubts which exist in the absence of agreement, and also take into account the particular circumstances.

The status of forces agreements which have been entered into since World War II are illuminating with respect to the consensus of states as to the proper allocation of jurisdiction. They suggest that in special circumstances complete immunity for the visiting force may be appropriate. They also suggest that in other circumstances, as where a large force is to be stationed in a receiving state for an indefinite period, the situation is relatively stable, and a common language or cultural background make likely much intermingling of the troops and the local population, only a limited immunity will normally be accorded the visiting forces.

The most interesting development reflected in the status of forces agreements, in the light of much that has been written on the subject of jurisdiction, is the readiness of receiving states to accord immunity (or priority of jurisdiction in the sending state) with respect to *inter se* offenses. Receiving states have also shown a perhaps less marked willingness to recognize the on-base concept, either as alone justifying according exclusive or prior

jurisdiction to the sending state, or at least as an added factor supporting according such jurisdiction to the sending state over *inter se* offenses committed on a base. These attitudes are in marked contrast to the reluctance of receiving states to recognize such jurisdiction in the sending state over duty-connected offenses. Much of the reluctance arises from a state's interest in protecting its citizens from the criminal acts of the visiting forces, even though the acts were done in performance of duty. A part of the reluctance stems, however, from the difficulties encountered in defining the concept, determining which acts fall within it, and deciding who is empowered to make the decision on whether a particular act was or was not duty-connected. Many misunderstandings could be avoided if these matters could be clarified.

The large number of waivers that receiving states have granted suggests they are prepared to yield jurisdiction to a sending state in many cases which fall outside the *inter se*, on-base, and duty-connected categories. The wide use of waivers as a substitute for an agreed allocation of jurisdiction is undesirable, since it sometimes permits irrelevant or improper considerations to influence the decision. Several recent agreements mark the beginning of an effort to deal with this problem. Neither these first attempts nor any of several alternative approaches suggest, however, that establishing new categories or guidelines for the allocation of jurisdiction will be easy. It may be that more experience is needed before these efforts are likely to be successful. In the meantime, the practice initiated in Italy of exercising discretion in asking for waivers, rather than asking waivers in all cases involving American troops, is a step in the right direction.

It should be kept in mind always that the status of forces problem concerns the issue of jurisdiction, not that of the guilt or innocence of the accused. All the evidence shows that visiting forces are characteristically treated as fairly—and at least as leniently—when they are tried in a civil court of an ally as when they are tried by their own courts-martial. Moreover, relations among the nations of the Free World are a crucial factor in the cold war which makes it necessary that troops be stationed abroad. Insisting that the members of these forces can be tried only by courts-martial of the sending states, if the insistence is based on any ground other than demonstrable military exigency, can trouble those relations. Also, making a major incident of case after case in which a member of a visiting force is held for

trial in a receiving state's court is destructive of discipline. The threat of nuclear war requires a higher rather than lower level of discipline in the Free World's armed forces. Obviously, the ultimate solution to many of the status of forces problems would be the attainment of a standard of discipline which reduces to an absolute minimum the cases in which a member of an armed force violates the law of any state. In the meantime, it is suggested that two lines of approach will be most helpful. One is to try to identify additional classes of cases which both sending and receiving states may be prepared to agree should come under the exclusive or primary jurisdiction of one or the other. The second is to improve the administrative and enforcement provisions of status of forces agreements. Much can be done in this area to eliminate friction without the sacrifice of any significant interest of any state.

APPENDIX I

NATO STATUS OF FORCES AGREEMENTS

Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces. June 19, 1951. 4 UST 1792, TIAS 2846, 199 UNTS 68.

The Parties to the North Atlantic Treaty signed in Washington on 4th April, 1949.¹

Considering that the forces of one Party may be sent by arrangement, to serve in the territory of another Party;

Bearing in mind that the decision to send them and the conditions under which they will be sent, in so far as such conditions are not laid down by the present Agreement, will continue to be the subject of separate arrangements between the Parties concerned;

Desiring, however, to define the status of such forces while in the territory of another Party;

Have agreed as follows:

ARTICLE I

1. In this Agreement the expression—

(a) “force” means the personnel belonging to the land, sea, or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a “force” for the purposes of the present Agreement;

(b) “civilian component” means the civilian personnel ac-

¹ A Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty was signed on August 28, 1952. 5 UST 870, TIAS 2978, 200 UNTS 340. An Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff was signed on September 20, 1951. 5 UST 1087, TIAS 2992, 200 UNTS 4.

companying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located ;

(c) “dependent” means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support ;

(d) “sending State” means the Contracting Party to which the force belongs ;

(e) “receiving State” means the Contracting Party in the territory of which the force or civilian is located, whether it be stationed there or passing in transit ;

(f) “military authorities of the sending State” means those authorities of a sending State who are empowered by its law to enforce the military law of that State with respect to members of its forces or civilian components ;

(g) “North Atlantic Council” means the Council established by Article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorised to act on its behalf.

ARTICLE II

It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

* * * * *

ARTICLE VII

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State ;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the terri-

tory of the receiving State and punishable by the law of that State;

2. (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exer-

cise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

5. (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.

(c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State.

6. (a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.

(b) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the

authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments, or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.

(b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.

11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

ARTICLE XV

1. Subject to paragraph 2 of this Article, this Agreement shall remain in force in the event of hostilities to which the North Atlantic Treaty applies, except that the provisions for settling claims in paragraphs 2 and 5 of Article VIII shall not apply to war damage, and that the provisions of the Agreement, and, in particular of Articles III and VII, shall immediately be reviewed by the Contracting Parties concerned, who may agree to such modifications as they may consider desirable regarding the application of the Agreement between them.

2. In the event of such hostilities, each of the Contracting Parties shall have the right, by giving 60 days' notice to the other Contracting Parties to suspend the application of any of the provisions of this Agreement so far as it is concerned. If this right is exercised, the Contracting Parties shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

APPENDIX II

ICELAND. ANNEX TO DEFENSE AGREEMENT¹

Annex to Defense Agreement between the United States and Iceland, May 8, 1951. 2 UST 1533, TIAS 2295.

ARTICLE 1

In this annex, the expression "United States Forces" includes personnel belonging to the armed services of the United States and accompanying civilian personnel who are in the employ of such services and are not nationals of nor ordinarily resident in Iceland, all such personnel being in the territory of Iceland in connection with operations under this Agreement.²

ARTICLE 2

1. (a) The United States military courts will on no occasion have jurisdiction in Iceland over nationals of Iceland or other persons who are not subject to the military laws of the United States.

(b) It is the duty of members of the United States forces and their dependents in Iceland to respect the laws of Iceland and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Iceland. The United States will take appropriate measures to that end.

2. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within Iceland all jurisdiction and control conferred on them by the laws of the United States over all persons subject to the military law of the United States.

(b) the authorities of Iceland shall have jurisdiction over the members of the United States forces with respect to offenses committed within Iceland and punishable by the law of Iceland.

¹ Came into force on 8 May 1951, by signature.

² See p. 173 of 2 UST 1533, TIAS 2295.

3. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses relating to its security, but not to that of Iceland, and to all acts punishable by the law of the United States, but not by the law of Iceland.

(b) The authorities of Iceland shall have the right to exercise exclusive jurisdiction over members of the United States forces with respect to offenses relating to the security of Iceland, but not to the security of the United States, and to all acts punishable by the law of Iceland, but not by the law of the United States.

(c) A security offense against Iceland or the United States shall include

1. Treason

2. Sabotage, espionage or violation of any law relating to official secrets of Iceland or the United States, or secrets relating to the national defense of Iceland or the United States.

4. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over a member of the United States forces in relation to

1. Offenses solely against the property of the United States or offenses solely against the person or property of another member of the United States forces or of a dependent of a member of such force.

2. Offenses arising out of any act done in the performance of official duty.

(b) In the case of any other offense the authorities of Iceland shall have the primary right to exercise jurisdiction.

(c) If the United States or Iceland, whichever has the primary right, decides not to exercise jurisdiction, it shall notify the authorities of the United States or Iceland, as the case may be, as soon as practicable. The authorities of the United States or of Iceland, whichever has the primary right, shall give sympathetic consideration to a request from the authorities of the United States or Iceland, as the case may be, for a waiver of its rights in cases where the authorities of the other country considers such waiver to be of particular importance.

5. A death sentence shall not be carried out in Iceland by the authorities of the United States.

6. (a) The authorities of the United States and Iceland shall assist each other in the arrest of members of the United States forces and their dependents who commit offenses in Iceland and in handing them over to the authorities which are to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Iceland shall notify promptly the military authorities of the United States of the arrest in Iceland of any members of the United States forces or of their dependents.

(c) The custody of an accused over whom Iceland is to exercise jurisdiction shall, if he is in the hands of the authorities of the United States, remain in the hands of such authorities until he is charged by Iceland.

7. (a) If a member of the United States forces is accused of an offense the appropriate authorities of the United States and Iceland will render mutual assistance in the necessary investigation into the offense and trial of the offender.

(b) If the case is one within the jurisdiction of the United States, the authorities of Iceland will themselves carry out the necessary arrangements to secure the presence of and obtain evidence from Icelandic nationals and other persons in Iceland, except from members of the United States forces and their dependents, outside the agreed areas. In cases where it is necessary under the laws of the United States for the authorities of the United States to obtain themselves information from Icelandic nationals, the Icelandic authorities will make all possible arrangements to secure the attendance of such nationals for interrogation in the presence of Icelandic authorities at places designated by them.

The military authorities will, in a similar manner, carry out the collection of evidence from members of the United States forces and their dependents in the case of an offense within the jurisdiction of the Icelandic authorities.

(c) The authorities of the United States and of Iceland shall notify one another of the results of all investigations and trials in cases where there are concurrent rights to exercise jurisdiction.

8. Where a member of the United States forces or dependent of a member thereof has been tried by the authorities of the

United States and has been acquitted, or has been convicted and is serving or has served his sentence, he may not be tried again for the same offense by the authorities of Iceland.

9. Whenever a member of the United States forces or a dependent of a member thereof is prosecuted under the jurisdiction of Iceland, he shall be entitled:

- (a) To a prompt and speedy trial;
- (b) To be informed in advance of trial of the specific charge or charges made against him;
- (c) To be confronted with the witnesses against him;
- (d) To have compulsory process for obtaining witnesses in his favor, if within the jurisdiction of Iceland;
- (e) To defense by a qualified advocate or counsel of his own choice, or, failing such choice, appointed to conduct his defense;
- (f) If he considers it necessary, to have the services of a competent interpreter; and
- (g) To communicate with a representative of his government and, when the rules of the court permit, to have such a representative present at his trial.

10. The United States forces shall have the right to police the agreed areas and to take all appropriate measures to insure the maintenance of discipline, order and security in such areas. Outside the agreed areas, military members of the United States forces shall be employed in police duties subject to arrangements with the authorities of Iceland and jointly with those authorities, and insofar as such employment is necessary to maintain discipline and order among the members of the United States forces and the dependents of members thereof.

The Icelandic authorities with whom members of the United States forces may be so employed shall have paramount authority with respect to the person or property of Icelandic nationals and other persons of non-Icelandic nationality, except members of the United States forces and their dependents and non-Icelandic employees of contractors of the United States, involved in any matter concerning the maintenance of order and discipline referred to above outside the agreed areas.

APPENDIX III

THE NETHERLANDS. ANNEX TO AGREEMENT IMPLEMENTING NATO AGREEMENT

Annex to Agreement between the United States and the Netherlands, Implementing NATO agreement. August 13, 1954. 6 UST 103, 106, TIAS 3174.

With respect to paragraph 4 of the exchange of notes dated August 13, 1954, the United States Government and The Netherlands Government have reached the following understandings between them concerning the implementation in The Netherlands of the Agreement signed at London on June 19, 1951, Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

1. The expression "dependent" in paragraph 1(c) of Article I also includes relatives who habitually reside with and are actually dependent on a member of a United States force or civilian component.

* * * * *

3. The Netherlands authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities. The United States assumes the responsibility for custody pending trial. The United States authorities will make these people immediately available to Netherlands authorities upon their request for purposes of investigation and trial and will give full attention to any other special wishes of the appropriate Netherlands authorities as to the way in which custody should be carried out.

4. The Netherlands Government confirms that persons subject to United States military law, prosecuted under Netherlands

jurisdiction, will be entitled to have a representative of the United States Government present during their trial, which will be public except when the court decrees otherwise in accordance with Netherlands law.

5. In applying paragraph 10(a) of Article VII to areas jointly used by the forces of the United States and The Netherlands, internal security measures will be a matter of joint consultation between the authorities of these forces.

APPENDIX IV

GREECE. AGREEMENT IMPLEMENTING NATO AGREEMENT

Agreement between the United States and Greece implementing the NATO Agreement. September 7, 1956. 7 UST 2556, TIAS 3649.

ARTICLE I

* * * * *

2. "Agreement between the Parties of the North Atlantic Treaty Regarding the Status of Their Forces", dated June 19, 1951, shall govern the status of the forces of the United States in Greece as well as members of these forces, members of the civilian component, and their dependents, who are in Greece and who are serving in that country in furtherance of objectives of the North Atlantic Treaty Organization, or who are temporarily present in Greece.

ARTICLE II

1. The Greek authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, paragraph 3(c) of that Agreement, except when they determine that it is of particular importance that jurisdiction be exercised by the Greek authorities.

2. In those cases where, in accordance with the foregoing paragraph, there is waiver of jurisdiction by the Greek authorities, the competent United States authorities shall inform the Greek Government of the disposition of each such case.

ARTICLE III

1. In such cases where the Government of Greece may exercise criminal jurisdiction as provided for in Article II above, the

United States authorities shall take custody of the accused pending completion of trial proceedings. Custody of the accused will be maintained in Greece. During the trial and pretrial proceedings the accused shall be entitled to have a representative of the United States Government present. The trial shall be public unless otherwise agreed.

APPENDIX V

TURKEY. AGREEMENT IMPLEMENTING NATO AGREEMENT

Agreement between the United States and Turkey implementing the NATO Agreement. June 23, 1954. 5 UST 1465, TIAS 3020, 233 UNTS 192.

For the implementation of the "Agreement Between the Parties to the North Atlantic Treaty, Regarding the Status of their Forces," dated June 19, 1951, the two Governments have agreed as follows:

1. All persons who are relatives of, and in accordance with United States laws or regulations, depending for support upon and actually residing with any member of a United States force or the civilian component, except those who are not United States citizens, shall also be considered dependents and will be treated in all respects as those persons defined in Article I, paragraph 1, sub-paragraph c, of the aforesaid NATO Agreement.

2. For the purpose of the application of the aforesaid NATO Agreement and of the provisions of this Agreement, persons "who are in the employ of" the United States armed services, within the meaning of Article I-1 (b) of the aforesaid NATO Agreement, and without prejudice to the other requirements of that Article, shall include employees of United States military organizations, employees of United States Government departments, Post Exchanges, and recreational organizations for military personnel, Red Cross and United Services Organization personnel, and technical representatives of contractors with the United States forces who are assigned to United States military organizations in Turkey. All of these persons are subject to United States military law. Should any other specific categories become involved, the United States Government would wish to discuss their inclusion in this paragraph with the authorities of the Turkish Government.

APPENDIX VI

GERMANY. CONVENTION ON RIGHTS AND OBLIGATIONS OF FOREIGN FORCES, AS AMENDED¹

Convention between the United States, the United Kingdom, France and Germany on the Rights and Obligations of Foreign Forces and their Members, May 26, 1952, as Amended by Schedule II to the Protocol on the Termination of the Occupation Regime, October 23, 1954. 6 UST 4117, 5608, TIAS 3425.

ARTICLE 1

DEFINITIONS

In the present Convention and the Annexes hereto the following terms shall be given the meanings hereinafter indicated:

* * * * *

7. Members of the Forces:

a. Persons who, by reason of their military service relationship, are serving with the armed Forces of the Three Powers of other Sending State and are present in the Federal territory (military personnel);

b. Other persons who are in the service of such armed Forces or attached to them, with the exception of persons who are nationals neither of one of the Three Powers nor of another Sending State and have been engaged in the Federal territory; provided that any such other persons who are stationed outside the Federal territory or Berlin shall be deemed to be members of the Forces only if they are present in the Federal Territory on duty (followers).

The following are considered "members of the Forces": dependents who are the spouses and children of persons defined in

¹ Terminated on 1 July 1963 with the coming into force of The Agreement on the Status of Forces in the Federal Republic of Germany, TIAS 5331. See next Appendix.

subparagraphs a and b of this paragraph or close relatives who are supported by such persons and for whom such persons are entitled to receive material assistance from the Forces. The definition "members of the Forces" shall include Germans only if they enlisted or were inducted into, or were employed by, the armed Forces of the Power concerned in the territory of that Power and at that time either had their permanent place of residence there or had been resident there for at least a year.

8. Germans: Germans within the meaning of German law.

9. Accommodation: Land, including all property permanently attached thereto, and all rights of use related to land, including such property, used or to be used by the Forces within the Federal territory.

10. Installations: Land, buildings or part thereof, and all property permanently attached thereto, which, pursuant to the provisions of the present Convention, are allotted for the exclusive use or occupancy (im ausschliesslichen Besitz) of the Forces. This definition shall not apply to Article 20 of the present Convention.

ARTICLE 2

OBSERVANCE OF GERMAN LAW: POLITICAL ACTIVITY

1. The members of the Forces shall observe German law, and the authorities of the Forces shall undertake and be responsible for the enforcement of German law against them, except as otherwise provided in the present or in any other applicable Convention or agreement.

2. The members of the Forces shall abstain from any activity inconsistent with the spirit of the present Convention and shall in particular refrain from any political activity.

* * * * *

Section I. Criminal Proceedings

ARTICLE 6

CRIMINAL OFFENCES: JURISDICTION AND APPLICABLE LAW

1. Except as otherwise provided in the present Convention, the authorities of the Forces shall exercise exclusive criminal jurisdiction over members of the Forces. A death sentence shall not

be carried out in the Federal territory by the authorities of the Forces as long as German law does not provide for such penalty.

2. Where, under the law of the Power concerned, the service tribunals are not competent to exercise criminal jurisdiction over a member of the Forces, the German courts and authorities may exercise criminal jurisdiction over him in respect of an offense under German law committed against German interests, in accordance with the following provisions :

(a) No criminal proceedings, other than those provided for in Article 7 of the present Convention, or urgent preliminary investigations, after consultation, as far as practicable, with the authorities of the Forces, shall be instituted by the German courts or authorities until the authorities of the Forces have been consulted by the appropriate German authorities and been given the opportunity, within twenty-one days from the receipt of information as to the facts involved, to make representations and recommendations in regard to the effect upon the security of the Forces of any such criminal proceedings; any such representations and recommendations shall be given due weight by the German courts or authorities. Such consultation shall, however, not be required where the alleged offence is one the penalty for which, under German law, is merely detention for not more than six weeks or a fine not exceeding DM 150 (*Übertretung*), unless the German authorities consider that the security of the Forces is or might be involved in the case in question ;

(b) The German courts and authorities shall, within the discretionary powers conferred on them by German law, abstain from prosecution in any case in which

(i) such abstention is permitted by German law ; or

(ii) the offender has been suitably punished by disciplinary action of the authorities of the Forces ;

(c) The German courts and authorities shall decide upon questions of arrest, detention and execution of punishment in accordance with the provisions of German law. The authorities of the Forces shall execute any warrants of arrest and detention. An accused person so taken into custody by the authorities of the Forces shall remain in their custody until, by virtue of a final (*rechtskräftig*) judicial decision, he is released or sentenced. The authorities of the Forces will take appropriate measures to prevent any prejudice to the course of justice (*Verdunkelungsgefahr*). They will hold an accused person so taken into custody

at the disposal of the German courts and authorities, will grant access to him at any time by the German courts and authorities and on request present him to the German courts and authorities for the purposes of investigatory proceedings, trial and the serving of any sentence which may be imposed. Where an accused person is not taken into custody, the authorities of the Forces will take measures to ensure that he is at the disposal of the German courts or authorities for the purposes aforesaid;

(d) Any sentence of imprisonment shall be served in a German penal institution. For the purposes of this paragraph, the expression "offence under German law committed against German interests" shall mean any offence under German law other than an offence directed against the Forces, their members, or the property of the Forces or their members.

3. The exclusive jurisdiction of the German authorities over persons who are subject to German criminal jurisdiction shall include those cases in which the criminal offence is directed against the Forces, their members, or the property of the Forces or their members.

4. With the consent of the German authorities the authorities of the Forces may transfer to German courts or authorities, for investigation, trial and decision, groups of, or particular, cases for which they are exclusively competent under paragraph 1 of this Article.

5. With the consent of the authorities of the Forces, the German authorities may transfer to the authorities of the Forces for investigation, trial and decision, particular cases of the nature described in paragraph 3 of this Article in which the alleged offender is not a German.

6. In cases under paragraphs 1 and 5 of this Article, the authorities of the Forces will apply their own law. If such cases involve acts which are punishable under German law, but not under the law of the Power concerned, German law shall apply.

POSTWAR SETTLEMENTS

7. In cases under paragraphs 3 and 4 of this Article, German law shall apply.

ARTICLE 7

ARREST, SEARCH AND SEIZURE

1. Members of the Forces who properly identify themselves by

means of an identity document issued under Article 24 of the present Convention shall not be subject to arrest by German authorities.

2. German authorities may, however, take into custody a member of the Forces, without subjecting him to the ordinary routine of arrest, in order immediately to deliver him, together with any weapons or items seized, to the nearest appropriate authorities of the Forces.

(a) when so requested by the authorities of the Forces ;

(b) in the following cases in which the authorities of the Forces are unable to act with the necessary promptness :

(i) when apprehended *in flagrante delicto*

(1) for the commission or attempted commission of a criminal offence which results or might result in serious injury to persons or property, or serious impairment of other legally protected rights (Rechtsgüter) ; or

(2) insofar as this appears necessary to abate an already existing serious disturbance of public order ;

(ii) if there is danger of flight, for the commission or attempted commission of espionage to the prejudice of the Federal Republic.

3. (a) The German authorities may search a member of the Forces or the property in his immediate possession

(i) when so requested by the authorities of the Forces ;

(ii) if he is taken into custody under paragraph 2 of this Article, to the extent necessary to disarm him or to seize any item constituting proof of the criminal offence for which he is taken into custody.

(b) The provisions of the fourth sentence of paragraph 5 of Article 35 of the present Convention shall not be affected.

(c) The official quarters of a member of the Forces, or where there are none the residence occupied by him with permission of the authorities of the Forces, may not be searched by German authorities, except at the request of the authorities of the Forces. If such residence of the member of the Forces is not an installation, either his consent or that of the authorities of the Forces to the search shall be sufficient.

4. The German authorities shall notify the appropriate authorities of the Forces of the arrest of any person working in the service of the Forces.

5. The appropriate authorities of the Forces may

(a) arrest members of the Forces ;

(b) take into custody a person who is subject to German criminal jurisdiction, without subjecting him to the ordinary routine of arrest, in order immediately to deliver him, together with any weapons or items seized, to the nearest appropriate German authorities

(i) when so requested by the German authorities ;

(ii) in the following cases in which the German authorities are unable to act with the necessary promptness :

(1) when apprehended *in flagrante delicto* for the commission or attempted commission of a criminal offense against the Forces, their members, or the security, property or other legally protected rights (Rechtsgüter) of the Forces or their members ; or

(2) if there is danger of flight, for the commission, or attempted commission, of a criminal offense under Sections 1 to 9 inclusive of Annex A to the present Convention ;

(iii) within an installation, when there are reasonable grounds to believe (dringender Verdacht) that his presence is unauthorized or that he has committed a criminal offence within the installation.

* * * * *

ARTICLE 8

PROCEDURE AND CO-OPERATION IN CRIMINAL PROCEEDINGS

1. The authorities of the Forces shall take such measures against members of the Forces who have committed criminal offences against German interests as they would take if such offences had been committed against the Power concerned, the Forces or their members, or their property.

2. The German authorities shall take such measures against persons subject to their criminal jurisdiction for criminal offences against the Forces, their members, or the property of the Forces or members, as they would take if such offences had been committed against the Federal Republic, its Länder or its nationals, or their property.

3. (a) The authorities of the Forces shall at the request of the German authorities notify the latter of the arrest of any person for a criminal offence described in paragraph 1 of this Article.

(b) The German authorities shall at the request of the authorities of the Forces notify the latter of the arrest of any per-

son for a criminal offence described in paragraph 2 of this Article.

4. Trial of a member of the Forces for a criminal offence described in paragraph 1 of this Article, committed within the Federal territory, shall be held within that territory except in cases of military exigency. When military exigency requires that the trial of such an offence be held outside the Federal territory, the authorities of the Forces shall so inform the German authorities, with particulars of the time and place of trial. The German authorities shall be entitled to have observers present unless security considerations require otherwise and shall be informed of the result of the trial.

5. The German authorities and the authorities of the Forces shall extend mutual co-operation in the prosecution of criminal offences under paragraphs 1 and 2 of this Article. Unless security considerations require otherwise, they shall permit representatives of the appropriate authorities to attend the trial and, within the applicable regulations, grant them the opportunity to present their views on questions of law and fact. In addition to the cases provided under German criminal procedure, the Forces or their members shall also have the right to appear as co-prosecutors (Nebenkläger) before German courts, to the extent that the criminal offence is directed against the security or the property of the Forces or their members or is one of the offences listed in Annex A to the present Convention. On request the German authorities and the authorities of the Forces shall inform each other of an intent to initiate, to refrain from initiating, or to discontinue a prosecution or disciplinary proceeding and of the decision.

* * * * *

ARTICLE 11

PRESENCE IN COURT. WITNESSES. SERVICE OF PROCESS

1. The authorities of the Forces shall, unless military exigency requires otherwise, secure the attendance of members of the Forces whose presence is required by a German court or authority, provided that such appearance is compulsory under German law. If military exigency prevents such attendance, the authorities of the Forces shall furnish a certificate stating the basis and duration of such disability.

2. German courts and authorities shall, in accordance with the provisions of German law, secure the attendance of persons whose presence as witnesses or experts is required by a service tribunal or other authority of the Forces.

3. The provisions of paragraphs 1 and 2 of this Article shall apply *mutatis mutandis* to all proceedings requiring the production of evidence.

4. Subject to the provisions of the present Convention or any other applicable agreement, the privileges and immunities of witnesses and experts before German courts or authorities, and service tribunals or authorities of the Forces, shall be those accorded by the law of the court, tribunal or authority concerned. Appropriate consideration shall also be given to the privileges and immunities which the witness or expert would have before a German court if he is not a member of the Forces, or, if he is a member of the Forces, before a service tribunal of the Power concerned.

5. The authorities of the Forces shall permit, or themselves effect, the service of process upon any person inside an installation, and upon members of the Forces. In all other cases service shall be made or permitted by the appropriate German courts or authorities.

6. Service by German courts and authorities on members of the Forces shall not be effected by publication or advertisement.

ARTICLE 12

OBSTRUCTION OF JUSTICE

Perjury, attempts to obstruct justice, any other criminal offences and contempts committed before or against a German court or authority or a service tribunal or authority of the Forces, and failure to comply with process duly served in accordance with Article 11 of the present Convention shall be dealt with by the court or authority having criminal jurisdiction or disciplinary authority over the person concerned, according to its own law, as if the act had been committed before or against its own courts or authorities.

* * * * *

ARTICLE 16

OFFICIAL ACTS

1. Whenever, in a criminal or noncriminal proceeding before a

German court or authority, it becomes necessary to determine whether the act or omission which is the subject of the proceeding occurred in the performance by the person concerned of official duty for the Forces, the German court or authority shall suspend the proceeding and shall promptly notify the authorities of the Forces, stating the facts of the case. The appropriate authority of the Forces shall investigate the case and within twenty-one days after receipt of the notification transmit to the German court or authority a certificate describing the scope of the official duties of the person concerned at the relevant time and place. The certificate shall be signed by the highest ranking representative of the Forces having personal knowledge of the matter. The authorities of the Forces shall take appropriate measures to ensure that the certificate is compiled conscientiously as to form and content. After receipt of the certificate, but no later than twenty-one days after receipt by the authorities of the Forces of the notification, the proceeding shall be continued.

2. The authorities of the Forces may also submit such certificate to a German court or authority without having received a notification from such court or authority.

3. Such certificate shall be evidence only on the scope of official duties of the person concerned and shall be conclusive to this extent. The person who issued such certificate may, however, be called as a witness to explain or amplify its contents; and further, the provisions of this paragraph shall not be applied in such manner as to limit the constitutional rights of a party to a proceeding to testify or make a factual or legal statement on his own behalf. The German court or authority shall give to the fact that the act or omission constituted the performance of official duty such legal weight and effect as it is entitled to under German law.

APPENDIX VII

GERMANY. AGREEMENT SUPPLEMENTING NATO AGREEMENT¹

Agreement to supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany of August 3, 1959.

ARTICLE 1

The Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed at London on 19 June 1951 (hereinafter referred to as the "NATO Status of Forces Agreement"), shall, as regards the rights and obligations of the forces of the Kingdom of Belgium, Canada, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the United States of America in the territory of the Federal Republic of Germany (hereinafter referred to as "the Federal Republic"), be supplemented by the provisions of the present Supplementary Agreement.

ARTICLE 2

1. In the present Agreement the term

(a) "a German" shall mean a German within the meaning of German law;

* * * * *

2. (a) A close relative of a member of a force or of a civilian component not falling within the definition contained in subparagraph (c) of paragraph 1 of Article I of the NATO Status of Forces Agreement who is financially or for reasons of health dependent on, and is supported by, such member, who shares the quarters occupied by such member and who is present in the Federal territory with the consent of the authorities of the force

¹ In force 1 July 1963, TIAS 5351.

shall be considered to be, and treated as, a dependent within the meaning of that provision.

(b) Should a member of a force or of a civilian component die or leave the Federal territory on transfer, the dependents of such member, including close relatives referred to in subparagraph (a) of this paragraph, shall be considered to be, and treated as, dependents within the meaning of subparagraph (c) of paragraph 1 of Article I of the NATO Status of Forces Agreement for a period of ninety days after such death or transfer if such dependents are present in the Federal territory.

ARTICLE 3

* * * * *

7. If, in the implementation of the NATO Status of Forces Agreement and of the present Agreement, no agreement is reached either on the local or on the regional level between the German authorities and the authorities of a force, the matter shall, unless the NATO Status of Forces Agreement or the present Agreement provides a special procedure, be referred to the competent central Federal authority and the higher authority of the force. The Federal Government of the higher authority of the force shall issue any individual instructions that may be necessary to the German authorities or to the authorities of the force and the civilian component respectively.

* * * * *

ARTICLE 17

1. Where, in order to decide upon the authority competent to exercise jurisdiction with respect to an offence, it is necessary to determine whether an act is punishable by the law of a sending State, the German court or authority dealing with the case shall suspend the proceedings and shall notify the competent authority of the sending State. The appropriate authority of the sending State may, within twenty-one days after receipt of the notification, or at any time if such notification has not yet been made, submit to the German court or authority a certificate stating whether or not the act is punishable by the law of the sending State. If the certificate is affirmative on this point, it shall specify the provision or legal basis under which the act is punishable, as well as the penalty prescribed.

2. The German court or authority shall make its decision in conformity with the certificate. In exceptional cases, however,

such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.

3. If it is to be determined whether an offence is punishable under German law, the procedure provided in paragraphs 1 and 2 of this Article shall apply *mutatis mutandis* with respect to the offence, the certificate being then issued by the supreme competent administrative authority of the Federal Republic or of the German Land concerned.

4. The provisions of paragraphs 1, 2 and 3 of this Article shall not apply as between the Federal Republic and any sending State which informs the Federal Republic that it does not intend to avail itself of these provisions or to extend the benefits thereof to the Federal Republic.

ARTICLE 18

1. Whenever, in the course of criminal proceedings against a member of a force or of a civilian component, it becomes necessary to determine whether an offence has arisen out of any act or omission done in the performance of official duty, such determination shall be made in accordance with the law of the sending State concerned. The highest appropriate authority of such sending State may submit to the German court or authority dealing with the case a certificate thereon.

2. The German court or authority shall make its decision in conformity with the certificate. In exceptional cases, however, such certificate may, at the request of the German court or authority, be made the subject of review through discussions between the Federal Government and the diplomatic mission in the Federal Republic of the sending State.

ARTICLE 19

1. At the request of a sending State, the Federal Republic shall, within the framework of sub-paragraph (c) of paragraph 3 of Article VII of the NATO Status of Forces Agreement, waive in favour of that State the primary right granted to the German authorities under sub-paragraph (b) of paragraph 3 of that Article in cases of concurrent jurisdiction, in accordance with paragraphs 2, 3, 4 and 7 of this Article.

2. Subject to any particular arrangements which may be

made under paragraph 7 of this Article, the military authorities of the sending States shall notify the competent German authorities of individual cases falling under the waiver provided in paragraph 1.

3. Where the competent German authorities hold the view that, by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction, they may recall the waiver granted under paragraph 1 of this Article by a statement to the competent military authorities within a period of twenty-one days after receipt of the notification envisaged in paragraph 2 or any shorter period which may be provided in arrangements made under paragraph 7. The German authorities may also submit the statement prior to receipt of such notification.

4. If, pursuant to paragraph 3 of this Article, the competent German authorities have recalled the waiver in a specific case and in such case an understanding cannot be reached in discussions between the authorities concerned, the diplomatic mission in the Federal Republic of the sending State concerned may make representations to the Federal Government. The Federal Government, giving due consideration to the interests of German administration of justice and to the interests of the sending State, shall resolve the disagreement in the exercise of its authority in the field of foreign affairs.

5. (a) With the consent of the German authorities, the military authorities of a sending State which has requested the waiver under paragraph 1 of this Article may transfer to the German courts or authorities for investigation, trial and decision, particular criminal cases in which jurisdiction rests with that State.

(b) With the consent of the military authorities of a sending State which has requested the waiver under paragraph 1 of this Article, the German authorities may transfer to the military authorities of that State for investigation, trial and decision, particular criminal cases, in which jurisdiction rests with the Federal Republic.

6. (a) Where a German court or authority exercises exclusive jurisdiction under sub-paragraph (b) of paragraph 2 of Article VII of the NATO Status of Forces Agreement, a copy of any document served on the accused shall be delivered, upon special or

general request of the sending State concerned, to the liaison agency referred to in Article 32 of the present Agreement.

(b) The liaison agency shall lend its assistance to the German courts and authorities to facilitate service of process in criminal matters.

7. In the implementation of the provisions of this Article and to facilitate the expeditious disposal of offences of minor importance, arrangements may be made between the military authorities of a sending State or States and the competent German authorities. These arrangements may also extend to dispensing with notification and to the period of time referred to in paragraph 3 of this Article within which the waiver may be recalled.

ARTICLE 20

1. The military authorities of a sending State may, without a warrant of arrest, take into temporary custody any person not subject to their jurisdiction

(a) if such person is caught or pursued in *flagrante delicto* and either

(i) the identity of the person cannot be established immediately, or

(ii) there is reason to believe that the person may flee from justice; or

(b) if so requested by a German authority, or

(c) if such person is a member of the force or of the civilian component of another sending State, or a dependent of any such member, upon request by an authority of that State.

2. If there is danger in delay and a German public prosecutor or German police officer cannot be called in time, the military authorities of a sending State may, without a warrant of arrest, take into temporary custody a person not subject to their jurisdiction if there are strong reasons to suspect (*dringender Verdacht*) that such person has committed or is making a punishable attempt to commit an offence within, or directed against, an installation of that State, or an offence punishable under Article 7 of the Fourth Law Amending the Criminal Law dated 11 June 1957 (*Bundesgesetzblatt Teil I*, page 597) in conjunction with Sections 99, 100, 100c, 100d, 100e, 109f, 109g and 363, of the German Criminal Code, or under such legislation as may replace these provisions in future. This provision shall apply only if the person in question is a fugitive from justice or in

hiding or if there are good reasons to fear that he is seeking to evade criminal proceedings consequent upon the commission of such offence or punishable attempt.

3. In cases falling within paragraph 1 or 2 of this Article the military authorities may, to such extent as may be necessary, disarm the person so taken into temporary custody, and may search him and seize any items in his possession which may serve as evidence for the purposes of the investigation of the suspected or alleged offence.

4. The military authorities shall, without delay, deliver any person taken into temporary custody in accordance with this Article, together with any weapons or other items so seized, to the nearest German public prosecutor or police officer or judge or to the military authorities of the sending State to whose force or civilian component the person belongs either as a member or as a dependent of such member.

5. The provisions of this Article shall not affect the constitutional immunities of the parliaments of the Federation and the Länder.

ARTICLE 21

1. Where an investigation is initiated or an arrest made by a German authority in respect of an act punishable under Article 7 of the Fourth Law Amending the Criminal Law dated 11 June 1957 (Bundesgesetzblatt Teil I, page 597) or under such legislation as may replace that Article in future, the German authorities conducting the investigations shall notify the military authorities of the sending State concerned without delay. The same shall apply if a German authority initiates an investigation or makes an arrest in respect of an act otherwise directed against the security of a sending State or of its force.

2. Where an investigation is initiated or an arrest made in the Federal territory by a competent authority of a sending State in respect of an act committed in the Federal territory and relating to matters affecting the security of the Federal Republic, this authority shall inform the German authorities without delay.

ARTICLE 22

1. (a) Where jurisdiction is exercised by the authorities of a sending State, custody of members of the force, of the civilian component, or dependents shall rest with the authorities of that State.

(b) Where jurisdiction is exercised by the German authorities, custody of members of a force, of a civilian component, or dependents shall rest with the authorities of the sending State in accordance with paragraphs 2 and 3 of this Article.

2. (a) Where the arrest has been made by the German authorities, the arrested person shall be handed over to the authorities of the sending State concerned if such authorities so request.

(b) Where the arrest has been made by the authorities of a sending State, or where the arrested person has been handed over to them under sub-paragraph (a) of this paragraph, they

(i) may transfer custody to the German authorities at any time;

(ii) shall give sympathetic consideration to any request for the transfer of custody which may be made by the German authorities in specific cases.

(c) In respect of offences directed solely against the security of the Federal Republic, custody shall rest with the German authorities in accordance with such arrangements as may be made to that effect with the authorities of the sending State concerned.

3. Where custody rests with the authorities of a sending State in accordance with paragraph 2 of this Article, it shall remain with these authorities until release or acquittal by the German authorities or until commencement of the sentence. The authorities of the sending State shall make the arrested person available to the German authorities for investigation and criminal proceedings (Ermittlungs- und Strafverfahren) and shall take all appropriate measures to that end and to prevent any prejudice to the course of justice (Verdunkelungsgefahr). They shall take full account of any special request regarding custody made by the competent German authorities.

ARTICLE 23

Where a person is arrested in any case referred to in paragraph 1 of Article 21 of the present Agreement, a representative of the sending State concerned shall have access to that person. Where a person arrested in any case referred to in paragraph 2 of that Article is held in custody by the authorities of a force, a German representative shall have a corresponding right to the extent to which the sending State avails itself of the right of access afforded by the first sentence of this Article. The German authorities and the military authorities of the sending State shall

conclude such arrangements as may be required for the implementation of this Article. A representative of the State which has custody may be present when the right of access is exercised.

ARTICLE 24

At the request of the Federal Republic or of a sending State, the German authorities and the authorities of that State shall conclude arrangements to facilitate the fulfillment of the obligation of mutual assistance provided for in sub-paragraph (a) of paragraph 5 and sub-paragraph (a) of paragraph 6 of Article VII of the NATO Status of Forces Agreement.

ARTICLE 25

1. (a) Where criminal jurisdiction over a member of a force or of a civilian component or a dependent is exercised by a German court or a German authority, a representative of the sending State concerned shall have the right to attend the trial. Where an offence is solely directed against the security of the Federal Republic, or against any property within the Federal Republic, or against a German or a person present in the Federal territory, and jurisdiction is exercised in the Federal Republic by a court or authority of a sending State, a German representative shall have the right to attend the trial.

(b) For the purpose of the provisions set forth in sub-paragraph (a) of this paragraph

(i) the expression "property within the Federal Republic" shall not include property belonging either to a force or a civilian component or to a member of a force or of a civilian component or to a dependent;

(ii) the expression "a person present in the Federal territory" shall not include a member of a force or of a civilian component or a dependent.

(c) The provisions set forth in sub-paragraph (a) of this paragraph shall not apply if the attendance of a national representative is incompatible with the security requirements of the State exercising jurisdiction which are not at the same time security requirements of the other State.

(d) German courts and authorities on the one hand, and the courts and authorities of the sending State on the other hand, shall give each other timely notification of place and time of the trial.

2. Under the conditions stated in paragraph 1 of this Article a representative of the sending State shall also have a right to attend interrogations and other pre-trial investigations to such extent as may be agreed between the authorities of that State and those of the Federal Republic. If such arrangements are concluded, they shall, under the conditions stated in paragraph 1, give to a German representative a right corresponding to that of the representative of the sending State, and shall provide procedures for reciprocal notification.

ARTICLE 26

1. Where a member of a force or of a civilian component or a dependent is arraigned before a court of a sending State for an offence committed in the Federal territory against German interests, the trial shall be held in that territory

(a) except where the law of the sending State requires otherwise, or

(b) except where, in cases of military exigency or in the interests of justice, the authorities of the sending State intend to hold the trial outside the Federal territory. In this event they shall afford the German authorities timely opportunity to comment on such intention and shall give due consideration to any comments the latter may make.

2. Where the trial is held outside the Federal territory, the authorities of the sending State shall inform the German authorities of the place and date of the trial. A German representative shall be entitled to be present at the trial, except where his presence is incompatible with the rules of the court of the sending State or with the security requirements of that State, which are not at the same time security requirements of the Federal Republic. The authorities of the sending State shall inform the German authorities of the judgment and of the final outcome of the proceedings.

ARTICLE 27

Sections 212 to 212(b) of the German Code of Criminal Procedure, relating to expedited procedure, shall not be applicable in criminal proceedings against members of a force, of a civilian component, or against dependents.

ARTICLE 28

1. The military police of a force shall have the right to patrol

on public roads, on public transport, in restaurants (Gaststätten) and in all other places to which the public has access and to take such measures with respect to the members of a force, of a civilian component or dependents as are necessary to maintain order and discipline. Insofar as it is necessary or expedient the details of the exercise of this right shall be agreed upon between the German authorities and the authorities of the force, who shall maintain close mutual liaison.

2. If public order and safety are endangered or disturbed by an incident in which members of a force or of a civilian component or dependents are involved, the military police of a force shall, if so requested by the German authorities, take appropriate measures with respect to such persons to maintain or restore order and discipline.

ARTICLE 29

1. The Federal Republic shall bring about such legislative measures as it deems necessary to ensure the adequate security and protection within its territory of the forces, of the civilian components and of their members. This shall also apply to the Armed Forces of a sending State stationed in Berlin, to the civilian component thereof and to their members with regard to offences committed within the Federal territory.

2. To implement paragraph 11 of Article VII of the NATO Status of Forces Agreement and paragraph 1 of this Article the Federal Republic shall, in particular,

(a) ensure, in accordance with the provisions of German criminal law on treason, the protection of military secrets of the sending States;

(b) ensure, by way of criminal law, the protection of a force, a civilian component and their members to an extent not inferior to the protection which is or will be afforded to the German Armed Forces in the following fields:

(i) influencing the force, the civilian component or their members with intent to undermine their willingness to serve;

(ii) exposing the force to contempt;

(iii) inducement to disobedience;

(iv) inducement to desertion;

(v) facilitation of desertion;

(vi) sabotage;

(vii) collection of information concerning military matters;

- (viii) operation of a military intelligence service ;
- (ix) reproduction or description of military equipment, military installations or facilities, or of military activities ;
- (x) taking of aerial photographs.

3. For the purposes of sub-paragraph (a) of paragraph 2 of this Article, the term "military secrets" shall mean such facts, objects, conclusions and discoveries, in particular writings, drawings, models, formulae, or information about them, as concern defence and are kept secret by an agency of a sending State located on Federal territory or in Berlin out of consideration for the security of that State or of its force, or its Armed Forces stationed in Berlin. The term shall not include objects in respect of which the decision about keeping them secret is a matter for the Federal Republic, or information concerning such objects.

ARTICLE 30

To facilitate the implementation of Article VII of the NATO Status of Forces Agreement and the provisions of the present Agreement supplementary thereto and to ensure their uniform application, Mixed Commissions composed of a German representative to be appointed by the Federal Government and a representative of the sending State concerned shall be constituted at the request of either party. The task of these Mixed Commissions shall be to discuss questions submitted to them by the Federal Government or the highest authority of the force concerned with respect to the application of the provisions referred to in this Article. The German authorities and the authorities of the sending State shall give sympathetic consideration to any joint recommendation made by a Mixed Commission.

* * * * *

ARTICLE 37

1. (a) Where a member of a force or of a civilian component is summoned to appear before a German court or authority, the military authorities, unless military exigency requires otherwise, shall secure his attendance provided that such attendance is compulsory under German law. The liaison agency shall be requested to ensure execution of such summons.

(b) The provisions of sub-paragraph (a) of this paragraph shall apply *mutatis mutandis* to dependents insofar as the military authorities are able to secure their attendance; otherwise dependents will be summoned in accordance with German law.

2. Where persons whose attendance cannot be secured by the military authorities are required as witnesses or experts by a court or a military authority of a sending State, the German courts and authorities shall, in accordance with German law, secure the attendance of such persons before the court or military authority of that State.

ARTICLE 38

1. If in the course of criminal or non-criminal proceedings or hearings before a court or authority of a force or of the Federal Republic it appears that the disclosure of an official secret of either of the States concerned, or the disclosure of any information which could prejudice the security of either of them might result, the court or the authority shall, prior to taking further action, seek the written consent of the appropriate authority to the disclosure of the official secret or information. In the event that the appropriate authority advances considerations against disclosure, the court or authority shall take all steps in its power, including those to which paragraph 2 of this Article relates, to prevent such disclosure, provided no constitutional right of any party to the proceedings is thereby impaired.

2. The provisions of Sections 172 to 175 of the German Judicature Act (Gerichtsverfassungsgesetz) on the exclusion of the public from hearings in criminal and non-criminal proceedings, and of Section 15 of the German Code of Criminal Procedure on the transfer of criminal proceedings to a court in a different district, shall be applied *mutatis mutandis* in cases before German courts and authorities where there is a threat to the security of a force or of a civilian component.

ARTICLE 39

Privileges and immunities of witnesses and experts shall be those accorded by the law of the court or authority before which they appear. The court or authority shall, however, give appropriate consideration to the privileges and immunities which witnesses and experts, if they are members of a force or of a civilian component, or dependents, would have before a court of the sending State or, if they do not belong to these categories of persons, would have before a German court.

* * * * *

ARTICLE 53

1. Within accommodation made available for its exclusive use,

a force or a civilian component may take all the measures necessary for the satisfactory fulfillment of its defence responsibilities. Within such accommodation, the force may apply its own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than those prescribed in German law.

2. The first sentence of paragraph 1 of this Article shall apply *mutatis mutandis* to measures taken in the air space above accommodation, provided that measures which might interfere with air traffic are taken only in coordination with the German authorities. The provisions of paragraph 7 of Article 57 of the present Agreement shall remain unaffected.

3. In carrying out the measures referred to in paragraph 1 of this Article, the force or the civilian component shall ensure that the German authorities are enabled to take, within the accommodation, such measures as are necessary to safeguard German interests.

4. The German authorities and the authorities of the force or of the civilian component shall co-operate to ensure the smooth implementation of the measures referred to in paragraphs 1, 2 and 3 of this Article. The details of such co-operation are set forth in paragraphs 5 to 7 of the Section of the Protocol of Signature referring to this Article.

5. Where accommodation is used jointly by a force or a civilian component and the German Armed Forces or German civilian agencies, the regulations required for such use shall be laid down in administrative agreements or in special agreements in which appropriate consideration shall be given to the position of the Federal Republic as receiving State as well as to the defence responsibilities of the force.

6. In order to enable a force or a civilian component satisfactorily to fulfil its defence responsibilities, the German authorities shall take appropriate measures, at the request of the force to

(a) establish restricted areas (Schutzbereiche) ;

(b) supervise or restrict construction, cultivation and movement in the vicinity of accommodation made available to the force for its use.

* * * * *

ARTICLE 71

1. The non-German non-commercial organizations listed in

paragraph 2 of the Section in the Protocol of Signature referring to this Article shall be considered to be, and treated as, integral parts of the force.

2. (a) The non-German non-commercial organizations listed in paragraph 3 of the Section in the Protocol of Signature referring to this Article shall enjoy the benefits and exemptions accorded to the force by the NATO Status of Forces Agreement and the present Agreement to the extent necessary for the fulfillment of the purposes described in paragraph 3 of that Section. However, benefits and exemptions in respect of imports for, deliveries to, or services for these organizations shall be granted only if such imports, deliveries or services are effected through the authorities of the force or of the civilian component or through official procurement agencies designated by these authorities.

(b) The organizations referred to in sub-paragraph (a) of this paragraph shall not have the powers enjoyed by the authorities of a force or of a civilian component under the NATO Status of Forces Agreement and the present Agreement.

* * * * *

4. Other non-German non-commercial organizations may, in specific cases, be accorded, by means of administrative agreements, the same treatment as the organizations listed in paragraph 2 or 3 of the Section in the Protocol of Signature referring to this Article, if they

(a) are necessary to meet the military requirements of a force and

(b) operate under the general direction and supervision of the force.

5. (a) Subject to the provisions of paragraph 6 of this Article, employees exclusively serving organizations listed in paragraph 2 or 3 of the Section in the Protocol of Signature referring to this Article shall be considered to be, and treated as, members of a civilian component.

* * * * *

(b) Sub-paragraph (a) of this paragraph shall also apply to employees of organizations which, in accordance with paragraph 4 of this Article, are accorded the same treatment as the organizations listed in paragraph 2 or 3 of the Section in the Protocol of Signature referring to this Article.

6. The provisions of paragraph 5 of this Article shall not apply to

(a) stateless persons ;

(b) nationals of any State which is not a Party to the North Atlantic Treaty ;

(c) Germans ;

(d) persons ordinarily resident in the Federal territory.

* * * * *

ARTICLE 73

Technical experts whose services are required by a force and who in the Federal territory exclusively serve that force either in an advisory capacity in technical matters or for the setting up, operation or maintenance of equipment shall be considered to be, and treated as, members of the civilian component. This provision, however, shall not apply to

(a) stateless persons ;

(b) nationals of any State which is not a Party to the North Atlantic Treaty ;

(c) Germans ;

(d) persons ordinarily resident in the Federal territory.

* * * * *

ARTICLE 75

1. (a) Except in a case where the accused is a German, neither Article 19 of the present Agreement nor paragraphs 1, 2 and 3 of Article VII of the NATO Status of Forces Agreement shall apply to an offence alleged to have been committed by a member of the forces prior to the entry into force of the present Agreement where before that date

(i) proceedings in respect of such offence have been initiated or terminated by an authority of a force exercising judicial powers, or

(ii) the prosecution of the offence became barred, under the law of the sending State concerned, by the expiry of a prescribed period of time.

(b) Where proceedings are pending at the date of entry into force of the present Agreement, the provisions of the Forces Convention concerning the exercise of jurisdiction over offences committed by such members shall continue to have effect for those proceedings, as if that Convention were still in force, until the conclusion of the proceedings, provided notification of the cases

so pending shall be made to the German authorities within a period of ten days after that date.

2. In imposing a penalty in respect of an offence committed prior to the entry into force of the present Agreement, the German court or authority shall give due consideration to the penalty prescribed by the law of the sending State to which the accused was subject at the time of the commission of the offence, if it appears that such penalty is lighter than that prescribed by German law.

ARTICLE 76

Defensive works, the execution of which has been agreed with the Federal Republic prior to the entry into force of the present Agreement or on which work has commenced prior to that date, shall be completed as planned.

* * * * *

ARTICLE 80

The provisions of Article XV of the NATO Status of Forces Agreement shall apply to the present Agreement, it being understood that references in that Article to other provisions of the NATO Status of Forces Agreement shall be deemed to be references to those provisions as supplemented by the present Agreement.

ARTICLE 81

1. Subject to the provisions of paragraph 2 of this Article, the present Agreement shall remain in force while forces are stationed in the Federal Republic in accordance with the terms of the Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954 or any arrangement which may replace it.

2. The present Agreement shall lapse

(a) if the Federal Republic denounces the NATO Status of Forces Agreement, when its denunciation takes effect pursuant to Article XIX of that Agreement;

(b) between the Federal Republic and any sending State that denounces the NATO Status of Forces Agreement when such denunciation takes effect.

* * * * *

APPENDIX VIII

GERMANY. PROTOCOL OF SIGNATURE TO SUPPLEMENTARY AGREEMENT

Protocol of Signature to the Supplementary Agreement, August 3, 1959. TIAS 5351.

PART I

Agreed Minutes and Declarations concerning the NATO Status of Forces Agreement

Re Article I, paragraph 1, sub-paragraph (a)

1. In view of the definition of a "force," the Federal Republic regards the NATO Status of Forces Agreement and the Supplementary Agreement as being applicable also to such forces of a sending State as are temporarily in the Federal territory in accordance with paragraph 3 of Article 1 of the Convention on the Presence of Foreign Forces in the Federal Republic of Germany of 23 October 1954.

2. Service attachés of a sending State in the Federal Republic, the members of their staffs and any other service personnel enjoying diplomatic or other special status in the Federal Republic shall not be regarded as constituting or included in a "force" for the purpose of the NATO Status of Forces Agreement and the Supplementary Agreement.

3. Except in cases of military exigency, the Governments of the sending States will make every effort not to station in the territory of the Federal Republic as members of a force persons who are solely Germans.

4. (a) The following non-appropriated fund organizations and activities are integral parts of the United States force:

- (i) European Exchange System (EES)
- (ii) Air Forces Europe Exchange (AFEX)
- (iii) USAREUR Class VI Agency
- (iv) USAFE Class VI Agency
- (v) European Motion Picture Service

- (vi) USAFE Motion Picture Service
- (vii) USAREUR Special Services Fund
- (viii) USAREUR Special Service Reimbursable Fund
- (ix) American Forces Network
- (x) Dependent Education Group (including Dependent Schools)
- (xi) Armed Forces Recreation Center Fund
- (xii) Association of American Rod and Gun Clubs in Europe
- (xiii) Stars and Stripes
- (xiv) Other non-appropriated fund organizations, including authorized clubs and messes

5. Members of the Armed Forces of a sending State stationed in Berlin, of their civilian components and dependents shall be considered to be, and treated as, members of the force, of the civilian component or dependents while on leave in the Federal territory.

* * * * *

Re Article VII

1. The Federal Republic regards offences dealt with under administrative penal procedure (Verwaltungsstrafverfahren) and offences subject to a fine only (ordnungswidrigkeiten) as offences punishable by the law of the receiving State within the meaning of Article VII and the provisions of the Supplementary Agreement directly relating thereto.

2. (a) In view of sub-paragraph (b) of paragraph 1 of Article VII, the Federal Republic does not consider it to be within its competence to decide on requests for extradition of members of a force, of a civilian component or dependents.

(b) The sending States will not act upon requests for extradition of Germans who are present in the Federal territory as members of a force or as dependents.

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PART II

Agreed Minutes and Declarations concerning Supplementary Agreement

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Re Article 2

The authorities of the forces shall limit as far as possible the number of close relatives, within the meaning of sub-paragraph

(a) of paragraph 2 of Article 2, to be admitted to the Federal territory.

* * * * *

Re Article 19

1. The request for a waiver of the primary right of the Federal Republic to exercise criminal jurisdiction provided for in paragraph 1 of Article 19 shall be made at the time of the entry into force of the Supplementary Agreement by those of the sending States which have decided to make use of the waiver. The Federal Republic shall grant the waiver to these sending States when the Supplementary Agreement enters into force. If a sending State decides, after the entry into force of the Supplementary Agreement, to make use of the waiver, the State concerned shall not request such waiver until agreement has been reached with the Federal Government on the necessary transitional arrangements.

2. (a) Subject to a careful examination of each specific case and to the results of such examination, major interests of German administration of justice within the meaning of paragraph 3 of Article 19 may make imperative the exercise of German jurisdiction, in particular in the following cases:

(i) offences within the competence of the Federal High Court of Justice (Bundesgerichtshof) in first and last instance or offences which may be prosecuted by the Chief Federal Prosecutor (Generalbundesanwalt) at the Federal High Court of Justice;

(ii) offences causing the death of a human being, robbery, rape, except where these offences are directed against a member of a force or of a civilian component or a dependent;

(iii) attempt to commit such offences or participation therein.

(b) In respect of the offences referred to in sub-paragraph (a) of this paragraph the authorities concerned shall proceed in particularly close cooperation from the beginning of the preliminary investigations in order to provide the mutual assistance envisaged in paragraph 6 of Article VII of the NATO Status of Forces Agreement.

Re Article 22

The sending States shall retain the right to keep in custody the arrested person either in a detention institution of their own or with their force. In order to ensure smooth implementation of the obligations imposed by the second sentence of paragraph 3

of Article 22, the authorities of the sending States shall keep the arrested person, where possible, in the vicinity of the seat of the German authority dealing with the case; this, however, shall not constitute an obligation on their part to keep the arrested person outside the area of the force.

Re Article 26, paragraph 1, subparagraph (b)

The term "military exigency" may also apply to cases in which the offence was committed by a person temporarily present in the Federal territory for the purpose of training exercises or manoeuvres.

* * * * *

Re Article 71

1. Unless otherwise agreed with the German authorities, the total number of civilian employees within the meaning of Article 56 of the Supplementary Agreement, who, on the entry into force of that Agreement, are permanently employed in sales agencies and clubs serving a force, may not be increased by more than 25 percent.

* * * * *

3. Non-German non-commercial organizations within the meaning of paragraph 2 of Article 71:

(a) American organizations:

(i) American Red Cross

Purpose:

Welfare and other assistance services for members of the force or of the civilian component and dependents.

(ii) University of Maryland

Purpose:

University courses for members of the force or of the civilian component and dependents

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APPENDIX IX

GERMANY. AGREEMENT ON THE STATUS OF PERSONS ON LEAVE

Agreement between the Federal Republic of Germany and the United States on the Status of Persons on Leave, August 3, 1959. TIAS 5352.

THE FEDERAL REPUBLIC OF GERMANY
and
THE UNITED STATES OF AMERICA
HAVE AGREED AS FOLLOWS:

ARTICLE 1

With respect to members and civilian employees of the United States Armed Forces, who are stationed in Europe or North Africa and outside the Federal territory and Berlin, and dependents who accompany them,

(a) Articles II, III, VII, VIII, X, XI, XII, XIII, XIV of the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, signed at London on 19 June 1951 (hereinafter referred to as the "NATO Status of Forces Agreement") and,

(b) Article 2; sub-paragraphs (c) and (d) of paragraph 1 and sub-paragraphs (a) and (c) of paragraph 2 of Article 5; Articles 6, 8, 15, 16, 17, 19, 22 through 25; paragraph 2 of Article 26; paragraph 2 of Article 36; Articles 39, 41, 59, 64, 66, 68, 69, 74 and 75 of the Agreement to supplement the NATO Status of Forces Agreement with respect to Foreign Forces stationed in the Federal Republic of Germany, signed at Bonn on 3rd August 1959 (hereinafter referred to as the "Supplementary Agreement")

shall apply when such persons are temporarily in the Federal territory on leave, provided they are in possession of documentation identifying their duty station (hereinafter referred to as "persons on leave").

ARTICLE 2

1. Where a person on leave commits an offense against German interests, and provided that the United States military authorities are competent to exercise criminal jurisdiction, they will hold or return the accused for trial before a United States military court in the Federal territory except with respect to offenses of minor importance punishable through the exercise of disciplinary jurisdiction, or except in cases of military exigency.

2. In a case of military exigency the provisions of subparagraph (b) of paragraph 1 of Article 26 of the Supplementary Agreement shall apply *mutatis mutandis*.

3. The United States military authorities shall notify the German authorities of the disposition of all cases referred to in this Article.

APPENDIX X

GREENLAND. AGREEMENT WITH DENMARK ON DEFENSE OF GREENLAND

Agreement between Denmark and the United States concerning the Defense of Greenland. April 27, 1951. 2 UST 1485, TIAS 2292, 94 UNTS 37.

* * * * *

ARTICLE II

In order that the Government of the United States of America as a party to the North Atlantic Treaty may assist the Government of the Kingdom of Denmark by establishing and/or operating such defense areas as the two Governments, on the basis of NATO defense plans, may from time to time agree to be necessary for the development of the defense of Greenland and the rest of the North Atlantic Treaty area, and which the Government of the Kingdom of Denmark is unable to establish and operate singlehanded, the two Governments in respect of the defense areas thus selected, agree to the following:

(1) The national flags of both countries shall fly over the defense areas.

(2) Division of responsibility for the operation and maintenance of the defense areas shall be determined from time to time by agreement between the two Governments in each case.

(3) In cases where it is agreed that responsibility for the operation and maintenance of any defense area shall fall to the Government of the United States of America, the following provisions shall apply:

(a) The Danish Commander-in-Chief of Greenland may attach Danish military personnel to the staff of the commanding officer of such defense area, under the command of an officer with whom the United States commanding officer shall consult on all important local matters affecting Danish interests.

(b) Without prejudice to the sovereignty of the Kingdom of Denmark over such defense area and the natural right of the

competent Danish authorities to free movement everywhere in Greenland, the Government of the United States of America, without compensation to the Government of the Kingdom of Denmark, shall be entitled within such defense area and the air spaces and waters adjacent thereto:

(i) to improve and generally to fit the area for military use;

(ii) to construct, install, maintain, and operate facilities and equipment, including meteorological and communications facilities and equipment, and to store supplies;

(iii) to station and house personnel and to provide for their health, recreation and welfare;

(iv) to provide for the protection and internal security of the area;

(v) to establish and maintain postal facilities and commissary stores;

(vi) to control landings, take-offs, anchorages, moorings, movements, and operation of ships, aircraft, and waterborne craft and vehicles, with due respect for the responsibilities of the Government of the Kingdom of Denmark in regard to shipping and aviation;

(vii) to improve and deepen harbors, channels, entrances, and anchorages.

(c) The Government of the Kingdom of Denmark reserves the right to use such defense area in cooperation with the Government of the United States of America for the defense of Greenland and the rest of the North Atlantic Treaty area, and to construct such facilities and undertake such activities therein as will not impede the activities of the Government of the United States of America in such area.

(4) In cases where it is agreed that responsibility for the operation and maintenance of any defense area shall fall to the Government of the Kingdom of Denmark, the following provisions shall apply:

(a) The Government of the United States of America may attach United States military personnel to the staff of the commanding officer of such defense area, under the command of an officer with whom the Danish commanding officer shall consult on all important local matters affecting United States interests pursuant to the North Atlantic Treaty.

(b) The Government of the United States of America, with-

out compensation to the Government of the Kingdom of Denmark, may use such defense area in cooperation with the Government of the Kingdom of Denmark for the defense of Greenland and the rest of the North Atlantic Treaty area, and may construct such facilities and undertake such activities therein as will not impede the activities of the Government of the Kingdom of Denmark in such area.

* * * * *

ARTICLE VI

The Government of the United States of America agrees to cooperate to the fullest degree with the Government of the Kingdom of Denmark and its authorities in Greenland in carrying out operations under this Agreement. Due respect will be given by the Government of the United States of America and by United States nationals in Greenland to all the laws, regulations and customs pertaining to the local population and the internal administration of Greenland, and every effort will be made to avoid any contact between United States personnel and the local population which the Danish authorities do not consider desirable for the conduct of operations under this Agreement.

* * * * *

ARTICLE VIII

The Government of the United States of America shall have the right to exercise exclusive jurisdiction over those defense areas in Greenland for which it is responsible under Article II (3), and over any offenses which may be committed in Greenland by the aforesaid military or civilian personnel or by members of their families, as well as over other persons within such defense areas except Danish nationals, it being understood, however, that the Government of the United States of America may turn over to the Danish authorities in Greenland for trial any person committing an offense within such defense areas.

* * * * *

ARTICLE X

Upon the coming into force of a NATO agreement to which the two Governments are parties pertaining to the subjects involved in Articles VII, VIII and IX of this Agreement, the provisions of the said articles will be superseded by the terms of such agreement to the extent that they are incompatible therewith.

If it should appear that any of the provisions of such NATO agreement may be inappropriate to the conditions in Greenland, the two Governments will consult with a view to making mutually acceptable adjustments.

APPENDIX XI

JAPAN. AGREEMENT UNDER ARTICLE VI OF THE TREATY OF MUTUAL COOPERATION AND SECURITY.¹

Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, regarding facilities and areas and the status of United States armed forces in Japan. January 19, 1960. 11 UST 1652, TIAS 4510.

ARTICLE I

In this Agreement the expression—

(a) “members of the United States armed forces” means the personnel on active duty belonging to the land, sea, or air armed services of the United States of America when in the territory of Japan.

(b) “civilian component” means the civilian persons of United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan or who are mentioned in paragraph 1 of Article XIV. For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals.

(c) “dependents” means

(1) Spouse, and children under 21 ;

(2) Parents, and children over 21, if dependent for over half their support upon a member of the United States armed forces or civilian component.

* * * * *

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of

¹ 11 UST 1632, TIAS 4509.

Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

(b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its laws but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the

authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authorities of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any

facilities or areas which they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article V of the Treaty of Mutual Cooperation and Security apply, either the Government of the United States or the Government of Japan shall have the right, by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the Governments of the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

* * * * *

AGREED MINUTES TO THE AGREEMENT UNDER ARTICLE VI OF THE TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN, REGARDING FACILITIES AND AREAS AND THE STATUS OF UNITED STATES ARMED FORCES IN JAPAN. January 19, 1960. 11 UST 1749, TIAS 4510.

ARTICLE XVII

Re paragraph 1(a) and paragraph 2(a) :

The scope of persons subject to the military laws of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2(c) :

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3(a) (ii) :

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged

offense, if committed by him, arose out of an act or omission done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3(c) :

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3(a)(ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4 :

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5 :

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicted by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a de-

pendent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9 (g) concerning the presence of a representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10(a) and 10(b):

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of

the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of a judgment concerning such property, except property owned or utilized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

APPENDIX XII

LEASED BASES. AGREEMENT WITH GREAT BRITAIN ON LEASED NAVAL AND AIR BASES

Agreement between United States and Great Britain regarding
Leased Naval and Air Bases, March 27, 1941, EAS 235, 55
Stat. 1560.

ARTICLE IV JURISDICTION

(1) In any case in which—

(a) a member of the United States forces, a national of the United States or a person who is not a British subject shall be charged with having committed, either within or without the Leased Areas, an offence of a military nature, punishable under the law of the United States, including, but not restricted to, treason, an offence relating to sabotage or espionage, or any other offence relating to the security and protection of United States naval and air Bases, establishments, equipment or other property or to operations of the Government of the United States in the Territory; or

(b) a British subject shall be charged with having committed any such offence within a Leased Area and shall be apprehended therein; or

(c) a person other than a British subject shall be charged with having committed an offence of any other nature within a Leased Area, the United States shall have the absolute right in the first instance to assume and exercise jurisdiction with respect to such offence.

(2) If the United States shall elect not to assume and exercise such jurisdiction the United States Authorities shall, where such offence is punishable in virtue of legislation enacted pursuant to Article V or otherwise under the law of the Territory, so inform the Government of the Territory and shall, if it shall be agreed between the Government of the Territory and the United States Authorities that the alleged offender should be brought to trial,

surrender him to the appropriate authority in the Territory for that purpose.

(3) If a British subject shall be charged with having committed within a Leased Area an offence of the nature described in paragraph (1) (a) of this Article, and shall not be apprehended therein, he shall, if in the Territory outside the Leased Areas, be brought to trial before the courts of the Territory; or, if the offence is not punishable under the law of the Territory, he shall, on the request of the United States Authorities, be apprehended and surrendered to the United States Authorities, and the United States shall have the right to exercise jurisdiction with respect to the alleged offence.

(4) When the United States exercises jurisdiction under this Article and the person charged is a British subject, he shall be tried by a United States court sitting in a Leased Area in the Territory.

(5) Nothing in this Agreement shall be construed to affect, prejudice or restrict the full exercise at all times of jurisdiction and control by the United States in matters of discipline and internal administration over members of the United States forces, as conferred by the law of the United States and any regulations made thereunder.

ARTICLE V

SECURITY LEGISLATION

The Government of the Territory will take such steps as may from time to time be agreed to be necessary with a view to the enactment of legislation to ensure the adequate security and protection of the United States naval and air Bases, establishments, equipment and other property, and the operations of the United States under the Leases and this Agreement and the punishment of persons who may contravene any laws or regulations made for that purpose. The Government of the Territory will also from time to time consult with the United States Authorities in order that the laws and regulations of the United States and the Territory in relation to such matters may, so far as circumstances permit, be similar in character.

ARTICLE VI

ARREST AND SERVICE OF PROCESS

(1) No arrest shall be made and no process, civil or criminal,

shall be served within any Leased Area except with the permission of the Commanding Officer in charge of the United States forces in such Leased Area; but should the Commanding Officer refuse to grant such permission he shall (except in cases where the United States Authorities elect to assume and exercise jurisdiction in accordance with Article IV(1)) forthwith take the necessary steps to arrest the person charged and surrender him to the appropriate authority of the Territory or to serve such process, as the case may be, and to provide for the attendance of the server of such process before the appropriate court of the Territory or procure such server to make the necessary affidavit or declaration to prove such service.

(2) In cases where the courts of the United States have jurisdiction under Article IV, the Government of the Territory will on request give reciprocal facilities as regards the service of process and the arrest and surrender of alleged offenders.

(3) In this Article the expression "process" includes any process by way of summons, subpoena, writ or other judicial document for securing the attendance of a witness, for the production of any documents or exhibits, required in any proceedings civil or criminal.

ARTICLE VII

RIGHT OF AUDIENCE FOR UNITED STATES CONSUL

In cases in which a member of the United States forces shall be a party to civil or criminal proceedings in any court of the Territory by reason of some alleged act or omission arising out of or in the course of his official duty, United States counsel (authorised to practise before the courts of the United States) shall have the right of audience, provided that such counsel is in the service of the Government of the United States and appointed for that purpose either generally or specially by the appropriate authority.

ARTICLE VIII

SURRENDER OF OFFENDERS

Where a person charged with an offence which fails to be dealt with by the courts of the Territory is in a Leased Area, or a person charged with an offence which falls under Article IV to be dealt with by courts of the United States is in the Territory but outside the Leased Areas, such person shall be surrendered to

the Government of the Territory or to the United States Authorities, as the case may be, in accordance with special arrangements made between that Government and those Authorities.

ARTICLE XXX

INTERPRETATION

In this Agreement, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them :

“The United States Authorities” means the authority or authorities from time to time authorised or designated, by the Government of the United States of America, for the purpose of exercising the powers in relation to which the expression is used.

“United States forces” means the naval and military forces of the United States of America.

“British subject” includes British protected person.

APPENDIX XIII

REVISED LEASED BASES. AGREEMENT WITH GREAT BRITAIN REVISING LEASED BASES AGREEMENT

Agreement between the United Kingdom and the United States modifying Articles IV and VI of the Leased Bases Agreement of March 27, 1941. July 19 and August 1, 1950. 1 UST 585, TIAS 2105, 88 UNTS 273.

ARTICLE IV

JURISDICTION

(1) The Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in the Territory:

(a) Where the accused is a member of a United States force,

(i) if a state of war exists, exclusive jurisdiction over all offences wherever committed;

(ii) if a state of war does not exist, exclusive jurisdiction over security offences wherever committed and United States interest offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed.

(b) Where the accused is a British subject or a local alien and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas.

(c) Where the accused is not a member of a United States force, a British subject or a local alien, but is a person subject to United States military or naval law,

(i) if a state of war exists, exclusive jurisdiction over security offences committed inside the Leased Areas; and United States interest offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed;

(ii) if a state of war does not exist and there is no civil court of the United States sitting in the Territory, exclusive

jurisdiction over security offences which are not punishable under the law of the Territory; concurrent jurisdiction over all other offences committed inside the Leased Areas.

(iii) if a state of war does not exist and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas; concurrent jurisdiction over all other offences wherever committed.

(d) Where the accused is not a member of a United States force, a British subject or a local alien, and is not a person subject to United States military or naval law, and a civil court of the United States is sitting in the Territory, exclusive jurisdiction over security offences committed inside the Leased Areas; concurrent jurisdiction over all other offences committed inside the Leased Areas and, if a state of war exists, over security offences committed outside the Leased Areas.

(2) Wherever, under paragraph (1) of this Article, the Government of the United States of America has the right to exercise exclusive jurisdiction over security offences committed inside the Leased Areas, such right shall extend to security offences committed outside the Leased Areas which are not punishable under the law of the Territory.

(3) In every case in which under this Article the Government of the United States of America has the right to exercise jurisdiction and the accused is a British subject, a local alien or, being neither a British subject nor a local alien, is not a person subject to United States military or naval law, such jurisdiction shall be exercisable only by a civil court of the United States sitting in the Territory.

(4) In every case in which under this Article the Government of the United States of America has the right to exercise exclusive jurisdiction, the following provisions shall have effect:

(a) The United States authorities shall inform the Government of the Territory as soon as is practicable whether or not they elect to exercise such jurisdiction over any alleged offences which may be brought to their attention by the competent authorities of the Territory or in any other case in which the United States authorities are requested by the competent authorities of the Territory to furnish such information.

(b) If the United States authorities elect to exercise such jurisdiction, the accused shall be brought to trial accordingly, and

the courts of the Territory shall not exercise jurisdiction except in aid of a court or authority of the United States, as required or permitted by the law of the Territory.

(c) If the United States authorities elect not to exercise such jurisdiction, and if it shall be agreed between the Government of the Territory and the United States authorities that the alleged offender shall be brought to trial, nothing in this Article shall affect the exercise of jurisdiction by the courts of the Territory in the case.

(5) In every case in which under this Article the Government of the United States of America has the right to exercise concurrent jurisdiction, the following provisions shall have effect:

(a) The case shall be tried by such court as may be arranged between the Government of the Territory and the United States authorities.

(b) Where an offence is within the jurisdiction of a civil court of the Territory and of a United States military or naval court, conviction or acquittal of the accused by one such court shall not exclude subsequent trial by the other, but in the event of such subsequent trial the court in awarding punishment shall have regard to any punishment awarded in the previous proceedings.

(c) Where the offence is within the jurisdiction of a civil court of the Territory and of a civil court of the United States, trial by one shall exclude trial by the other.

(6) Notwithstanding anything contained elsewhere in this Article, when a state of war exists in which the Government of the United Kingdom is, and the Government of the United States of America is not, engaged, then in any case in which the Government of the United States of America would, but for this paragraph, have exclusive jurisdiction, that jurisdiction shall be concurrent in respect of any of the following offences against any part of His Majesty's dominions committed outside the Leased Areas or, if not punishable by the Government of the United States of America in the Territory, inside the Leased Areas:

(a) treason;

(b) any offence of the nature of sabotage or espionage or against any law relating to official secrets;

(c) any other offence relating to operations, in the Territory, of the Government of any part of His Majesty's dominions, or to the safety of His Majesty's naval, military or air bases or

establishments or any part thereof or of any equipment or other property of any such Government in the Territory.

(7) Nothing in this Article shall give the Government of the United States of America the right to exercise jurisdiction over a member of a United Kingdom Dominion or Colonial armed force, except that, if a civil court of the United States is sitting in the Territory and a state of war does not exist or a state of war exists in which the Government of the United States of America is, and the Government of the United Kingdom is not, engaged, the Government of the United States of America shall have the right, where the accused is a member of any such force, to exercise concurrent jurisdiction over security offences committed inside the Leased Areas.

(8) Nothing in this Article shall affect the jurisdiction of a civil court of the Territory except as expressly provided in this Article.

(9) In this Article the following expressions shall have the meanings hereby assigned to them:

(a) "British subject" shall not include a person who is both a British subject and a member of a United States force.

(b) "local alien" means a person, not being a British subject, a member of a United States force or a national of the United States who is ordinarily resident in the Territory.

(c) "member of a United States force" means a member (entitled to wear the uniform) of the naval, military or air forces of the United States of America.

(d) "security offence" means any of the following offences against the United States and punishable under the law thereof:

(i) treason;

(ii) any offence of the nature of sabotage or espionage or against any law relating to official secrets;

(iii) any other offence relating to operations, in the Territory, of the Government of the United States of America, or to the safety of the United States Naval or Air Bases or establishments or any part thereof or of any equipment or other property of the Government of the United States of America in the Territory.

(e) "state of war" means a state of actual hostilities in which either the Government of the United Kingdom or the Government of the United States of America is engaged and which has not been formally terminated, as by surrender.

(f) "United States interest offence" means an offence which (excluding the general interest of the Government of the Territory in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British subject or local alien) or property (not being property of a British subject or local alien) present in the Territory by reason only of service or employment in connection with the construction, maintenance, operation or defence of the Bases.

Note

It was also agreed: "That Article VI of the Agreement of March 27th, 1941 shall have effect as if the words '(except where, under Article IV, jurisdiction is to be exercised by the United States or is not exercisable by the courts of the Territory)' were substituted for the words '(except in cases where the United States authorities elect to assume and exercise jurisdiction in accordance with Article IV (1))'."

APPENDIX XIV

CANADA. AGREEMENT RELATING TO APPLICATION OF NATO AGREEMENT TO LEASED BASES IN CANADA

Agreement between the United States and Canada relating to the application of the NATO Agreement to United States Forces at the Leased Bases in Canada. April 28 and 30, 1952. 5 UST 2139, TIAS 3074, 235 UNTS 270.

Subject to the concurrence of the Canadian Government in the foregoing, the United States Government agrees that the NATO Status of Forces Agreement should be made applicable to all United States forces in Canada, including those at the leased bases and at Goose Bay, it being understood that those provisions of the Leased Bases Agreement which deal with the matters covered in the NATO Status of Forces Agreement will be held in abeyance until the NATO Status of Forces Agreement is terminated through expiration or denunciation. It is understood that the provisions of the Leased Bases Agreement dealing with matters not covered in the NATO Status of Forces Agreement will be unaffected.

Both the United States Government and the Canadian Government agree that uniform treatment of United States forces throughout Canada under the NATO Status of Forces Agreement would be in the interests of both countries and would make for simplification of administration.

APPENDIX XV

BAHAMA ISLANDS. AGREEMENT WITH GREAT BRITAIN RELATING TO LONG RANGE PROVING GROUND

Agreement between the United Kingdom and the United States for Establishment in the Bahama Islands of a Long-Range Proving Ground for Guided Missiles. July 21, 1950. 1 UST 545, TIAS 2099, 97 UNTS 194.

ARTICLE I DEFINITIONS

For the purposes of this Agreement:

(1) "Range Area" means that part of the Flight Testing Range which lies within the territory of the Bahama Islands (including the territorial waters thereof).

(2) "United States authorities" means the authority or authorities from time to time authorised or designated, by the Government of the United States of America, for the purpose of exercising the powers in relation to which the expression is used.

(3) "United States Forces" means the armed forces of the United States of America, and "member of the United States Forces" means a member of those forces who is entitled to wear the uniform thereof.

(4) "Flight Testing Range" means the area within the red and hatched line drawn on the attached map. (Not included herein).

(5) "National of the United States" means a citizen of the United States or a person who, though not a citizen of the United States, owes allegiance to the United States.

(6) "British national" means any British subject or Commonwealth citizen or any British-protected person, but shall not include a person who is both a British national and a member of the United States Forces.

(7) "Local alien" means a person, not being a British national, a member of the United States Forces or a national of the

United States, who is ordinarily resident in the Bahama Islands.

(8) "Sites" means the sites provided under Article IV of this Agreement so long as they are so provided.

* * * * *

ARTICLE V

JURISDICTION

(1) The Government of the United States of America shall have the right to exercise the following jurisdiction over offences committed in the Bahama Islands:

(a) Where the accused is a member of the United States Forces,

(i) if a state of war exists, exclusive jurisdiction over all offences wherever committed;

(ii) if a state of war does not exist, exclusive jurisdiction over security offences wherever committed and United States interest offences committed inside the Sites; concurrent jurisdiction over all other offences wherever committed.

(b) Where the accused is a British national or a local alien and a civil court of the United States is sitting in the Bahama Islands, exclusive jurisdiction over security offences committed inside the Sites.

(c) Where the accused is not a member of the United States Forces, a British national or a local alien, but is a person subject to United States military or naval law,

(i) if a state of war exists, exclusive jurisdiction over security offences committed inside the Sites and United States interest offences committed inside the Sites; concurrent jurisdiction over all other offences wherever committed;

(ii) if a state of war does not exist and there is no civil court of the United States sitting in the Bahama Islands, exclusive jurisdiction over security offences which are not punishable under the law of the Bahama Islands; concurrent jurisdiction over all other offences committed inside the Sites;

(iii) if a state of war does not exist and a civil court of the United States is sitting in the Bahama Islands, exclusive jurisdiction over security offences committed inside the Sites; concurrent jurisdiction over all other offences wherever committed.

(d) Where the accused is not a member of the United States Forces, a British national or a local alien, and is not a

person subject to United States military or naval law, and a civil court of the United States is sitting in the Bahama Islands, exclusive jurisdiction over security offences committed inside the Sites; concurrent jurisdiction over all offences committed inside the Sites and, if a state of war exists, over security offences committed outside the Sites.

(2) Wherever, under paragraph (1) of this Article, the Government of the United States of America has the right to exercise exclusive jurisdiction over security offences committed inside the Sites, such right shall extend to security offences committed outside the Sites which are not punishable under the law of the Bahama Islands.

(3) In every case in which under this Article the Government of the United States of America has the right to exercise jurisdiction and the accused is a British national, a local alien or, being neither a British national nor a local alien, is not a person subject to United States military or naval law, such jurisdiction shall be exercisable only by a civil court of the United States sitting in the Bahama Islands.

(4) In every case in which under this Article the Government of the United States of America has the right to exercise exclusive jurisdiction, the following provisions shall have effect:

(a) The United States authorities shall inform the Government of the Bahama Islands as soon as is practicable whether or not they elect to exercise such jurisdiction over any alleged offences which may be brought to their attention by the competent authorities of the Bahama Islands or in any other case in which the United States authorities are requested by the competent authorities of the Bahama Islands to furnish such information.

(b) If the United States authorities elect to exercise such jurisdiction, the accused shall be brought to trial accordingly, and the courts of the Bahama Islands shall not exercise jurisdiction except in aid of a court or authority of the United States, as required or permitted by the law of the Bahama Islands.

(c) If the United States authorities elect not to exercise such jurisdiction, and if it shall be agreed between the Government of the Bahama Islands and the United States authorities that the alleged offender shall be brought to trial, nothing in this Article shall affect the exercise of jurisdiction by the courts of the Bahama Islands in the case.

(5) In every case in which under this Article the Government

of the United States of America has the right to exercise concurrent jurisdiction, the following provisions shall have effect:

(a) The case shall be tried by such court as may be arranged between the Government of the Bahama Islands and the United States authorities.

(b) Where an offence is within the jurisdiction of a civil court of the Bahama Islands and of a United States military or naval court, conviction or acquittal of the accused by one such court shall not exclude subsequent trial by the other but in the event of such subsequent trial the court in awarding punishment shall have regard to any punishment awarded in the previous proceedings.

(c) Where the offence is within the jurisdiction of a civil court of the Bahama Islands and of a civil court of the United States, trial by one shall exclude trial by the other.

(6) Notwithstanding anything contained elsewhere in this Article, when a state of war exists in which the Government of the United Kingdom is, and the Government of the United States of America is not, engaged, then in any case in which the Government of the United States of America would, but for this paragraph, have exclusive jurisdiction, that jurisdiction shall be concurrent in respect of any of the following offences against any part of His Majesty's dominions committed outside the Sites or, if not punishable by the Government of the United States of America in the Bahama Islands, inside the Sites:

(a) treason;

(b) any offence of the nature of sabotage or espionage or against any law relating to official secrets;

(c) any other offence relating to operations in the Bahama Islands of the Government of any part of His Majesty's dominions, or to the safety of His Majesty's naval, military or air bases or establishments of any part thereof or of any equipment or other property of any such Government in the Bahama Islands.

(7) Nothing in this Article shall give the Government of the United States of America the right to exercise jurisdiction over a member of a United Kingdom, Dominion or Colonial armed force, except that, if a civil court of the United States is sitting in the Bahama Islands and a state of war does not exist or a state of war exists in which the Government of the United States of America is, and the Government of the United Kingdom is not, engaged, the Government of the United States of America shall

have the right, where the accused is a member of any such force, to exercise concurrent jurisdiction over security offences committed inside the Sites.

(8) Nothing in this Article shall affect the jurisdiction of a civil court of the Bahama Islands except as expressly provided in this Article.

(9) In this Article the following expressions shall have the meanings hereby assigned to them:

(a) "Security offence" means any of the following offences against the Government of the United States of America and punishable under the law of the United States of America:

(i) treason;

(ii) any offence of the nature of sabotage or espionage or against any law relating to official secrets;

(iii) any other offence relating to operations in the Bahama Islands, of the Government of the United States of America, or to the safety of any equipment or other property of the Government of the United States of America in the Bahama Islands.

(b) "State of war" means a state of actual hostilities in which either the Government of the United Kingdom or the Government of the United States of America is engaged and which has not been formally terminated, as by surrender.

(c) "United States interest offence" means an offence which (excluding the general interest of the Government of the Bahama Islands in the maintenance of law and order therein) is solely against the interests of the Government of the United States of America or against any person (not being a British national or local alien) or property (not being property of a British national or local alien) present in the Bahama Islands by reason only of service or employment in connection with the construction, maintenance, operation or defense of the Flight Testing Range.

ARTICLE VI

SECURITY LEGISLATION

The Government of the Bahama Islands will take such steps as may from time to time be agreed to be necessary with a view to the enactment of legislation to ensure the adequate security and protection of the Sites and United States equipment and other property, and the operations of the United States under this Agreement and the punishment of persons who may con-

travene any laws or regulations made for that purpose. The Government of the Bahama Islands will also from time to time consult with the United States authorities in order that the laws and regulations of the United States of America and of the Bahama Islands in relation to such matters may, so far as circumstances permit, be similar in character.

ARTICLE VII

ARREST AND SERVICE OF PROCESS

(1) No arrest of a person who is a member of the United States Forces or who is a national of the United States subject to United States military law shall be made and no process, civil or criminal, shall be served on any such person within any Site except with the permission of the Commanding Officer in charge of the United States Forces in such Site; but should the Commanding Officer refuse to grant such permission he shall (except where, under Article V, jurisdiction is to be exercised by the United States or is not exercisable by the courts of the Bahama Islands) forthwith take the necessary steps to arrest the person charged and surrender him to the appropriate authority of the Bahama Islands or to serve such process, as the case may be, and to provide for the attendance of the server of such process before the appropriate court of the Bahama Islands or procure such server to make the necessary affidavit or declaration to prove such service.

(2) In cases where the courts of the United States have jurisdiction under Article V, the Government of the Bahama Islands will on request give reciprocal facilities as regards the service of process and the arrest and surrender of persons charged.

(3) In this Article the expression "process" includes any process by way of summons, subpoena, warrant, writ or other judicial document for securing the attendance of a witness, or for the production of any documents or exhibits, required in any proceedings, civil or criminal.

ARTICLE VIII

RIGHT OF AUDIENCE FOR UNITED STATES COUNSEL

In cases in which a member of the United States forces shall be a party to civil or criminal proceedings in any court of the Bahama Islands by reason of some alleged act or omission arising out of or in the course of his official duty, United States counsel

(authorised to practise before the courts of the United States) shall have the right of audience, provided that such counsel is in the service of the Government of the United States of America and appointed for that purpose either generally or specially by the appropriate authority.

ARTICLE IX

SURRENDER OF PERSONS CHARGED

Where a person charged with an offence which fails to be dealt with by the courts of the Bahama Islands is in a Site, or a person charged with an offence which falls under Article V to be dealt with by courts of the United States is in the Bahama Islands but outside the Sites, such person shall be surrendered to the Government of the Bahama Islands, or to the United States authorities, as the case may be, in accordance with special arrangements made between that Government and those authorities.

APPENDIX XVI

DOMINICAN REPUBLIC. AGREEMENT RELATING TO LONG-RANGE PROVING GROUND

Agreement between the United States and the Dominican Republic regarding Long-Range Proving Ground, November 26, 1951.¹ 3 UST 2569, TIAS 2425, 150 UNTS 227.

* * * * *

ARTICLE XV

(1) (a) Except as provided in subparagraph (b), the Government of the United States of America shall have the right to exercise exclusive criminal jurisdiction over any offenses committed in the Dominican Republic by:

- (i) Members of the United States Forces;
- (ii) Other persons subject to United States military law except Dominican nationals or local aliens.

(b) Except during a period of hostilities in which either Government is engaged, the Government of the United States of America and the Government of the Dominican Republic shall have concurrent jurisdiction over offenses committed outside the sites referred to in Article II by persons described in subparagraph (a) against a Dominican national or local alien. In each such case, the Mixed Military Commission shall decide which Government shall exercise jurisdiction, and shall give consideration to whether the offense arose out of any act or omission done in the performance of official duties. During a period of hostilities in which either government is engaged the principle stated in subparagraph (a) shall apply.

(2) Whenever military authorities of the United States of America may exercise jurisdiction over an alleged offender, the authorities of the Dominican Republic will assist in the arrest and handing over of such alleged offenders, the collection of evi-

¹ Extended by Exchange of Notes of March 31, 1962 and July 25, 1962, (13 UST 2082, TIAS 5165) to September 30, 1962. Expired by its terms on that date.

dence and the carrying out of all necessary investigations, including the seizure and in proper cases the handing over of exhibits and all objects connected with the offense. All persons not subject to United States Government jurisdiction under this Agreement, who are charged with offenses committed on a site, or who are found on a site in connection with offenses committed elsewhere in the Dominican Republic, shall be surrendered to the Dominican authorities. In such cases the United States authorities will assist in the collection of evidence and the carrying out of all necessary investigations including the seizure and in proper cases the handing over of exhibits and all objects connected with the offense.

APPENDIX XVII

PHILIPPINES. AGREEMENT CONCERNING MILITARY BASES

Agreement between the Philippines and the United States concerning Military Bases, March 14, 1947. 61 Stat. 4019, TIAS 1775, 43 UNTS 272.

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ARTICLE III

DESCRIPTION OF RIGHTS

1. It is mutually agreed that the United States shall have the rights, power and authority within the bases which are necessary for the establishment, use, operation and defense thereof or appropriate for the control thereof and all the rights, power and authority within the limits of territorial waters and air space adjacent to, or in the vicinity of, the bases which are necessary to provide access to them, or appropriate for their control.

* * * * *

ARTICLE XIII

JURISDICTION

1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:

(a) Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines;

(b) Any offense committed outside the bases by any member of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States; and

(c) Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.

2. The Philippines shall have the right to exercise jurisdiction over all other offenses committed outside the bases by any member of the armed forces of the United States.

3. Whenever for special reasons the United States may desire not to exercise the jurisdiction reserved to it in paragraphs 1 and 6 of this Article, the officer holding the offender in custody shall so notify the fiscal (prosecuting attorney) of the city or province in which the offense has been committed within ten days after his arrest, and in such a case the Philippines shall exercise jurisdiction.

4. Whenever for special reasons the Philippines may desire not to exercise the jurisdiction reserved to it in paragraph 2 of this Article, the fiscal (prosecuting attorney) of the city or province where the offense has been committed shall so notify the officer holding the offender in custody within ten days after his arrest, and in such a case the United States shall be free to exercise jurisdiction. If any offense falling under paragraph 2 of this Article is committed by any member of the armed forces of the United States

(a) while engaged in the actual performance of a specific military duty, or

(b) during a period of national emergency declared by either Government and the fiscal (prosecuting attorney) so finds from the evidence he shall immediately notify the officer holding the offender in custody that the United States is free to exercise jurisdiction. In the event the fiscal (prosecuting attorney) finds that the offense was not committed in the actual performance of a specific military duty, the offender's commanding officer shall have the right to appeal from such finding to the Secretary of Justice within ten days from the receipt of the decision of the fiscal and the decision of the Secretary of Justice shall be final.

5. In all cases over which the Philippines exercises jurisdiction the custody of the accused, pending trial and final judgment, shall be entrusted without delay to the commanding officer of the nearest base, who shall acknowledge in writing that such accused has been delivered to him for custody pending trial in a competent court of the Philippines and that he will be held ready to appear and will be produced before said court when required by it. The commanding officer shall be furnished by the fiscal (prosecuting attorney) with a copy of the information against the accused upon the filing of the original in the competent court.

6. Notwithstanding the foregoing provisions, it is mutually agreed that in time of war the United States shall have the right to exercise exclusive jurisdiction over any offenses which may be committed by members of the armed forces of the United States in the Philippines.

7. The United States agrees that it will not grant asylum in any of the bases to any person fleeing from the lawful jurisdiction of the Philippines. Should any such person be found in any base, he will be surrendered on demand to the competent authorities of the Philippines.

8. In every case in which jurisdiction over an offense is exercised by the United States, the offended party may institute a separate civil action against the offender in the proper court of the Philippines to enforce the civil liability which under the laws of the Philippines may arise from the offense.

ARTICLE XIV

ARREST AND SERVICE OF PROCESS

1. No arrest shall be made and no process, civil or criminal, shall be served within any base except with the permission of the commanding officer of such base; but should the commanding officer refuse to grant such permission he shall (except in cases of arrest where the United States has jurisdiction under Article XIII) forthwith take the necessary steps to arrest the person charged and surrender him to the appropriate authorities of the Philippines or to serve such process, as the case may be, and to provide the attendance of the server of such process before the appropriate court in the Philippines or procure such server to make the necessary affidavit or declaration to prove such service as the case may require.

2. In cases where the service courts of the United States have jurisdiction under Article XIII, the appropriate authorities of the Philippines will, on request, give reciprocal facilities as regards the service of process and the arrest and surrender of alleged offenders.

* * * * *

ARTICLE XX

MILITARY OR NAVAL POLICE

It is mutually agreed that there shall be close cooperation on a reciprocal basis between the military and naval police forces of

the United States and the police forces of the Philippines for the purpose of preserving order and discipline among United States military and naval personnel.

APPENDIX XVIII

KOREA. AGREEMENT ON JURISDICTION¹

Agreement between the United States and Korea relating to Jurisdiction over Offenses by United States Forces in Korea. July 12, 1950. 5 UST 1408, TIAS 3012, 222 UNTS 228.

The American Embassy presents its compliments to the Ministry of Foreign Affairs of the Republic of Korea and has the honor to state that in the absence of a formal agreement defining and setting forth the respective rights, duties and jurisdictional limitations of the military forces of the United States (excepting the United States Military Advisory Group to Korea, which is covered by the agreement signed in Seoul on January 26, 1950)² and the Government of the Republic of Korea, it is proposed that exclusive jurisdiction over members of the United States Military Establishment in Korea will be exercised by courts-martial of the United States.

It is further proposed that arrests of Korean nationals will be made by United States forces only in the event Korean nationals are detected in the commission of offenses against the United States forces or its members. In the event that arrests of Korean nationals are made under the circumstances set forth above, such persons will be delivered to the civil authorities of the Republic of Korea as speedily as practicable.

The Ministry of Foreign Affairs and the Government of the Republic of Korea will understand that in view of prevailing conditions, such as the infiltrations of North Koreans into the territory of the Republic, United States forces cannot be submitted, or instructed to submit, to the custody of any but United States forces. Unless required, owing to the nonexistence of local courts, courts of the United States forces will not try nationals of the Republic of Korea.

The American Embassy would be grateful if the Ministry of

¹ Came into force on 12 July 1950 by the exchange of the said notes.

² United Nations, *Treaty Series*, Vol. 178, p. 97.

Foreign Affairs would confirm, in behalf of the Government of the Republic of Korea, the above-stated requirements regarding the status of the military forces of the United States within Korea.

* * * * *

The Ministry of Foreign Affairs of the Republic of Korea presents its compliments to the American Embassy and acknowledges the receipt of the Embassy's note of July 12, 1950, at Traejon.

The Ministry has the honor to inform the American Embassy that the Government of the Republic of Korea is glad to accept the propositions as set forth in the Embassy's note of July 12, 1950, that:

(1) The United States courts-martial may exercise exclusive jurisdiction over the members of the United States Military Establishment in Korea;

(2) In the event that arrest of Korean nationals by the United States forces are made necessary when the former are known to have committed offenses against the United States forces or its members, such person will be delivered to the civil authorities of the Republic of Korea as speedily as practicable; and

(3) The Ministry of Foreign Affairs understands that in view of prevailing conditions of warfare, the United States forces cannot be submitted to any but United States forces; and that courts of the United States forces will not try nationals of the Republic of Korea, unless requested owing to the nonexistence of local courts.

APPENDIX XIX

ETHIOPIA. AGREEMENT CONCERNING DEFENSE INSTALLATIONS

Agreement between the United States and Ethiopia concerning Defense Installations in Ethiopia. May 22, 1953. 5 UST 749, TIAS 2964, 191 UNTS 59.

* * * * *

ARTICLE II

The Imperial Ethiopian Government grants to the Government of the United States such rights, powers and authority within the Installations as are necessary for the establishment, control, use and operation of the Installations for military purposes. Such rights shall not include the right, power or authority to transfer or assign the Installations in whole or in part to, or to place them in whole or in part at the disposition of, any third state, government or military force.

* * * * *

ARTICLE XVII

1. Members of the United States forces shall respect the laws of Ethiopia and abstain from any activities inconsistent with the spirit of this Agreement. The Government of the United States shall take appropriate measures to this end.

2. The United States military authorities shall have the right to exercise within Ethiopia all jurisdiction and control over United States forces conferred on the United States military authorities by the laws and regulations of the United States, except as limited by this Article.

3. Members of the United States forces shall be immune from the criminal jurisdiction of Ethiopian courts, and, in matters arising from the performance of their official duties, from the civil jurisdiction of Ethiopian courts, provided that, in particular cases, the United States authorities may waive such immunity. In all other cases, Ethiopian courts shall have jurisdiction.

4. Whenever United States authorities exercise jurisdiction or

control pursuant to paragraph 2 or this Article, the judicial proceedings shall be conducted within the Installations or outside of Ethiopia. In such cases the appropriate authorities of the Imperial Ethiopian Government shall, upon request, assist in the collection of evidence and in the carrying out of all necessary investigations. Necessary arrangements will be made by the appropriate authorities of Ethiopia to secure the presence of Ethiopian nationals and other persons in Ethiopia (except members of the United States forces) as witnesses for official investigations and for military tribunals, and, in appropriate cases, to seize and hand over evidence, exhibits and objects connected with the offense. The United States authorities shall, in like manner, carry out the collection of evidence from members of the United States forces and assist the Ethiopian authorities in the case of an offense to be tried in the Ethiopian courts.

5. Ethiopian authorities may arrest members of the United States forces outside the Installations for the commission or attempted commission of an offence, but, in the event of such an arrest, the member or members shall be immediately turned over to the United States authorities. Except for Ethiopian nationals and other persons normally resident in Ethiopia, any person fleeing from the jurisdiction of the United States forces and found in any place outside the Installations may, on request, be arrested by the Ethiopian authorities and turned over to the United States authorities.

6. The United States authorities shall deliver to the Ethiopian authorities for trial and punishment all Ethiopian nationals and other persons normally resident in Ethiopia who have been charged by the Ethiopian or the United States authorities with having committed offenses within the limits of the Installations.

7. The Government of the United States shall have the right to police the Installations and to take all appropriate measures to assure the maintenance of discipline, order and security in such Installations.

8. Outside the Installations, members of the United States forces may be employed for police duties by arrangement with the appropriate authorities of the Imperial Ethiopian Government insofar as such employment is necessary to maintain discipline and order among the United States forces. In such cases, Ethiopian security forces with whom members of the United States forces may be serving on police duty shall have paramount

authority with respect to the person or property of persons subject to Ethiopian jurisdiction.

9. Each Government undertakes that persons subject to the jurisdiction of its courts who commit contempt or perjury in connection with courts-martial proceedings or proceedings of other military tribunals, shall be subjected to appropriate punitive action by its courts.

10. The Imperial Ethiopian Government undertakes to establish such measures of control or zones of access adjacent to such Installations as may, from time to time, in the opinion of the two Governments be essential for maintenance of the internal and external security of the Installations as well as the sanitation and health conditions of those Installations.

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ARTICLE XXIV

The term "United States forces" includes members of the armed forces of the United States (including dependents of all such members) and persons accompanying, serving with, or employed by said armed forces (including dependents of all such persons) who are subject to the military laws of the United States, but excluding indigenous Ethiopian nationals and other persons ordinarily resident in Ethiopian territory provided that such nationals or other persons are not dependents of members of the United States forces.

APPENDIX XX

LIBYA. AGREEMENT ON DEFENSE FACILITIES IN AGREED AREAS

Agreement between the United States and Libya on the use of Defense Facilities in Agreed Areas in Libya. September 9, 1954. 5 UST 2449, TIAS 3107.

ARTICLE XX

JURISDICTION—CRIMINAL MATTERS

(1) The United States military authorities shall have the right to exercise within the United Kingdom of Libya all criminal and disciplinary jurisdiction conferred on them by the laws of the United States of America over members of the United States forces in the following cases, namely:

(a) Offenses solely against the property of the Government of the United States of America, or against the person or property of another member of the United States forces,

(b) Offenses committed solely within the agreed areas,

(c) Offenses solely against the security of the United States of America, including treason, sabotage, espionage or violation of any law relating to official secrets, or secrets relating to the national defense of the United States of America,

(d) Offenses arising out of any act or omission done in the performance of official duty, and in every such case where such criminal and disciplinary jurisdiction exists, the members of the United States forces shall be immune from the jurisdiction of the Libyan courts.

(2) In other cases the Libyan courts shall exercise jurisdiction unless the Government of the United Kingdom of Libya waived its right to exercise jurisdiction. The Government of the United Kingdom of Libya will give sympathetic consideration to any request from the United States authorities for a waiver of its right in cases where the United States authorities consider such waiver to be of particular importance, or where suitable punish-

ment can be applied by disciplinary action without recourse to a court.

(3) The United States and Libyan authorities will assist each other in the arrest and handing over to the appropriate authority of members of the United States forces for trial in accordance with the above provisions, and the Libyan authorities will immediately notify the United States authorities if they arrest any member of the United States forces. The Libyan authorities will, if the United States authorities request the release on remand of an arrested member of the United States forces, release him from their custody on the United States authorities' undertaking to present him to the Libyan courts for investigatory proceedings and trial when required.

(4) The United States and Libyan authorities will assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the attendance of witnesses at the trial and the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(5) Whenever a member of the United States forces is prosecuted in a Libyan court he shall be entitled:

(a) to be presumed innocent until proved guilty according to law in a trial in which he has had the guarantees necessary for his defense,

(b) to a prompt and speedy public trial,

(c) to be informed, in advance of trial, of the specific charge or charges made against him,

(d) to refuse to testify against himself,

(e) to be confronted with the witnesses against him,

(f) to be permitted full opportunity to examine all witnesses, (g) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the Libyan courts,

(h) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Libya,

(i) to have his legal representatives present during all stages of proceedings against him,

(j) to have, if he considers it necessary, the services of a competent interpreter,

(k) to communicate with the United States authorities and to have a representative of those authorities present at his trial, and

(l) to such other rights as are guaranteed under the constitution and laws of the United Kingdom of Libya to persons on trial in those courts.

(6) The Libyan authorities will notify the United States authorities of the result of any trial in a Libyan court of a member of the United States forces.

(7) Witnesses who are alleged to have committed perjury or contempt of court in proceedings before the United States service tribunals or authorities and who are not subject to the law administered by those tribunals and authorities will be turned over to the Libyan authorities. Provision will be made by the laws of Libya for the trial and punishment of such offenders.

(8) The Government of the United States of America will have the right to police the agreed areas and to maintain order therein and may arrest therein any alleged offenders and, when they are triable by the Libyan courts, will forthwith turn them over to the Libyan authorities for trial.

(9) Outside the agreed areas, members of the United States forces may be employed on police duties by arrangement with the appropriate Libyan authorities. The Libyan authorities shall be primarily responsible for the protection of cables carrying light, power or communications to any of the agreed areas, whether such cables are the property of the Government of the United States of America or otherwise, but they may make arrangements with the United States authorities for the employment of members of the United States forces for this purpose. In such cases, the Libyan police with whom members of the United States forces may be serving shall have paramount authority with respect to the persons and property of persons who are nationals of or ordinarily resident in Libya.

ARTICLE XXVIII

DEFINITIONS

In the present Agreement the following expressions have the meanings hereby respectively assigned to them:

“United States forces” includes personnel belonging to the armed services of the United States of America and accompanying civilian personnel who are employed by or serving with such

services (including the dependents of such military and civilian personnel), who are not nationals of, nor ordinarily resident in Libya; and who are in the territory of Libya in connection with operations under the present Agreement.

APPENDIX XXI

LIBYA. MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding between the United States and Libya with respect to Criminal Jurisdiction provisions of Agreement of September 9, 1954. February 24, 1955. 7 UST 2051, TIAS 3607.

With respect to the "Agreement between the Government of the United States of America and the Government of the United Kingdom of Libya" signed at Benghazi on September 9, 1954, hereinafter referred to as "the Agreement," the two Governments have reached the following understanding concerning Article XX of the Agreement.

Under Paragraph (2) of Article XX of the Agreement the Government of the United Kingdom of Libya has reserved jurisdiction over members of the United States forces except as provided in Paragraph (1) of Article XX of the Agreement. In order to establish a policy which will govern the application of the provisions of Paragraph (2) the two Governments agree as follows:

(a) The Government of the United States of America declares that it is fully satisfied with the cooperation and understanding which the Libyan authorities have shown toward the United States military authorities in Libya.

(b) The Government of the United Kingdom of Libya declares that it is fully satisfied with the manner in which the United States military authorities have exercised disciplinary authority and criminal jurisdiction over members of the United States forces.

(c) The Government of the United States of America recognizes the interest of the Government of the United Kingdom of Libya in exercising the jurisdiction reserved to it in cases of particular importance to the United Kingdom of Libya.

(d) The two Governments recognize that it is in their common interest to take steps to ensure the continuation of the good relations that prevail between the people of the United Kingdom

of Libya and the members of the United States forces and also to ensure the effective discipline and security of the United States forces. To this end, the Government of the United Kingdom of Libya, in response to the desire of the Government of the United States of America, henceforth undertakes to waive its criminal jurisdiction in relation to members of the United States forces under the terms of the Agreement except in the case of an offense committed by a member of the United States forces which is considered by the Government of the United Kingdom of Libya to be of particular importance to the United Kingdom of Libya such as an offence against the safety of the Libyan State, an offense against the sovereignty or honor of the Libyan State, or an offence which the Libyan State considers to be of serious public concern, including sexual offenses which cause serious public concern. It is understood with respect to a case involving such an offence which is considered of particular importance to the United Kingdom of Libya that the Libyan authorities, taking into account the spirit of cooperation expressed in Article XX of the Agreement, will in the course of appropriate consultations between the Libyan authorities and the United States military authorities give sympathetic consideration to a request from the United States authorities for a waiver of the jurisdiction of the Libyan authorities in such a case. It is also understood that a waiver of jurisdiction in a case shall be final and thereafter the Libyan authorities will not exercise jurisdiction in relation to such a case.

(e) The Government of the United States of America undertakes to notify the Libyan authorities of the disposition made by the United States military authorities of all cases involving the waiver of jurisdiction referred to in the foregoing undertaking of the Government of the United Kingdom of Libya.

The two Governments agree that the policy set forth above shall be followed with regard to all cases arising since the time of entry into force of the Agreement, namely since twelve o'clock noon, Benghazi time, October 30, 1954.

APPENDIX XXII

SAUDI ARABIA. AGREEMENT CONCERNING DHAHRAN AIRFIELD

Agreement between Saudi Arabia and the United States concerning Dhahran Airfield. June 18, 1951. 2 UST 1466, TIAS 2290, 102 UNTS 73. Extended for five years on April 2, 1957, 8 UST 403, TIAS 3790.

1. The term Dhahran Airfield as used in this Agreement means the area of land located in the so-called Damman tracts measuring five statute miles on each side of a square with the center located at the terminal building of the existing airdrome.

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11. The members of the Mission, its personnel and employees may carry on any social activities on condition that they will take into account the local customs and laws in effect in Saudi Arabia.

12. (a) The complete authority and sovereignty inside and outside of Dhahran Airfield is the absolute right of the Saudi Arabian Government and it will make arrangements for guarding and maintaining the safety of the airport.

(b) The United States Mission will assign special guards for the installations which are used by the Mission and such guards will be responsible for such installations under their guard inside the airfield.

(c) The Mission shall comply with the request of the Director of the Dhahran Airport in appointing certain responsible persons from the Mission to accompany the Saudi patrol guards to identify members of the Mission and to cooperate during patrol duty.

13. (a) All United States military personnel, members of the Mission, and all civilian employees of the Mission who are United States nationals or the nationals of other friendly States and their dependents at Dhahran Airfield shall obey all applicable laws and regulations of the Kingdom of Saudi Arabia.

(b) Any offense committed by any of the individuals re-

ferred to in (a) with the exception of American military personnel will be subject to the local jurisdiction of the Kingdom of Saudi Arabia.

(c) Depending on international authority, the Saudi Arabian Government agrees that:

(i) If any member of the armed forces of the United States commits an offense inside Dhahran Airfield he will be subject to United States military jurisdiction.

(ii) In the case of any offense committed by a member of the armed forces of the United States outside Dhahran Airfield at Al Khobar, Dammam, Dhahran, Ras Tanura, the beaches south of Al Khobar to Half Moon Bay, and the roads leading to these places, the Saudi Arabian authorities will arrest the offender and after promptly completing the preliminary investigation will turn such person over to the Mission at Dhahran Airfield for trial and punishment under American military jurisdiction.

(iii) Any offense committed by a member of the armed forces of the United States outside the places mentioned in (i) and (ii) will be subject to the local jurisdiction of the Kingdom of Saudi Arabia.

APPENDIX XXIII

SPAIN. PROCEDURAL AGREEMENT NO. 16 TO THE 26 SEPTEMBER 1953 AGREEMENTS¹

Jurisdiction Over Members of United States Forces

1. Pursuant to the authority contained in the Agreements of 26 September 1953, the following procedures are established for the exercising of jurisdiction, control and custody over members of the United States Forces alleged to have committed an offense in Spanish territory.

2. a. The term, Chief, Joint United States Military Group, shall have reference to the Chief, Joint United States Military Group, Spain or to the Senior Military Officer assigned to duty with the United States Forces in Spanish territory.

b. The term "Commander" shall have reference to the Commanding Officer of the United States Forces at any fixed installation within the Spanish territory.

c. The term "Mixed Commission on Jurisdiction" shall have reference to a board of Spanish authorities whose principal duties shall be to assure that the spirit and intent of the terms of the Agreements signed on 26 September 1953 regarding criminal jurisdiction over members of the United States Forces are effectively carried out, and to implement, enforce and monitor the procedures hereafter established. The Commission shall be established within the building of the High General Staff in the Madrid area.

d. The term "Members of the United States Forces" has reference to military personnel of the United States Armed Forces, the technicians and personnel accompanying, serving with or employed by said forces who are subject to the military laws of the United States and members of the families of the aforementioned individuals.

3. Whenever Spanish authorities apprehend a member of the United States Forces for the alleged commission of an offense

¹ 4 UST 1876, TIAS 2849.

which in the judgment of the Spanish authorities requires detention or confinement, the following procedure will apply:

a. The person who is being detained or confined by Spanish authorities will, upon disclosure that he is a member of the United States Forces, be permitted, if he desires, to communicate with his superior authority by telephone or telegraph at the earliest opportunity.

b. The apprehending or detaining authority will, within twenty-four hours after the arrest or apprehension, furnish the following information to the Mixed Commission on Jurisdiction:

(1) Name and organization of United States Forces personnel involved and, if military, the grade and service number.

(2) Type of offense committed.

(3) Time, date and place offense committed.

(4) Disposition of persons involved.

(5) Investigative or security agency involved and location thereof.

(6) Description of identifying documents in the possession of the persons involved.

(7) Any other pertinent information.

c. Immediately upon receipt of the aforementioned information, the Mixed Commission on Jurisdiction, or a member thereof, will relay all available data to the Chief, Joint United States Military Group, or his designated representative. In this respect, the Mixed Commission on Jurisdiction will make arrangements to be operative twenty-four hours a day and seven days a week.

d. When United States authorities reasonably believe that the individual being detained or confined is a member of the United States Forces, the Chief, Joint United States Military Group, or his designated representative, will so certify to the Mixed Commission on Jurisdiction, (or a member thereof when the Mixed Commission on Jurisdiction is not in session) and will further request that the alleged offender be released into the custody of United States military authorities. The request will indicate the approximate time that the individual appointed to take the alleged offender into custody will present himself to the detaining authorities.

e. The Mixed Commission on Jurisdiction, or a member thereof, will honor the certification and request and will instruct the detaining or confining authority to release the alleged offender to the custody of United States military authorities.

f. Under some circumstances, United States military authorities may conclude that a guard is not required to return an alleged offender to United States military control. The aforementioned request will so indicate, and in these cases the Mixed Commission on Jurisdiction, or a member thereof, will arrange for immediate release of the alleged offender.

g. The Chief, Joint United States Military Group, or a "Commander," whichever is more convenient, will evaluate all evidence furnished by Spanish authorities and may conduct a supplementary investigation to determine all the facts and circumstances of the case. If the evaluation indicates that the offense is punishable under the Uniform Code of Military Justice, as set out in Manual for Courts-Martial, U.S. 1951 (as interpreted by judicial decisions) and that the alleged offender is a member of the United States Forces, the Chief, Joint United States Military Group, or his representative, will so certify to the Mixed Commission on Jurisdiction. The certification will indicate "prima facie" the article of the Uniform Code of Military Justice which the alleged offender may have violated.

h. The Mixed Commission on Jurisdiction may ordinarily accept this certification as conclusive proof of the facts certified, and will issue an order notifying the competent Spanish authorities that the United States Forces authorities will exercise jurisdiction in the case.

i. In those cases where the Mixed Commission on Jurisdiction takes exception to the certification referred to in paragraph 3g *supra*, the Mixed Commission on Jurisdiction shall prepare a brief of all the facts and circumstances of the case and the reasons for taking such exception. This brief shall be made in duplicate, one to be forwarded to the Spanish Minister of Justice and the other to the Chief, Joint United States Military Group or their delegates. These authorities shall, in consultation with each other, resolve the question presented, and their decision shall be binding and conclusive upon Spanish and United States authorities alike.

j. If a member of the United States Forces is apprehended by United States authorities for the commission of an offense punished by Spanish laws, a report thereof and the aforementioned certifications will be submitted to the Mixed Commission on Jurisdiction immediately but the individual shall be retained in the custody of the United States authorities.

4. The Chief, Joint United States Military Group, or the "Commander," as the case may be, will, subsequent to the determination that the offense allegedly committed is punishable under the Uniform Code of Military Justice and that the offender is a member of the United States Forces, conduct an extensive investigation of the alleged offense and will thereafter make a determination as to what further action will be taken concerning the criminal aspects of the case which shall be binding upon all concerned. The offender shall thereafter be immune from prosecution or suit in Spanish courts or tribunals for the criminal aspects of the same offense.

5. In some instances, members of the United States Forces may commit minor offenses which in the judgment of Spanish authorities do not require arrest or confinement or may become involved in accidents which come to the attention of Spanish authorities. These incidents will be reported to the Mixed Commission on Jurisdiction in writing and will be transmitted so as to reach the addressee within four days after the occurrence. These reports will not be acted upon by the Mixed Commission on Jurisdiction but will be transmitted to the Chief, Joint United States Military Group for whatever action he may deem appropriate in each case.

6. When necessary, branch offices of the Mixed Commission on Jurisdiction shall be established in cities adjacent to or in the vicinity of military installations where members of the United States Forces are stationed, or assembled, in sufficient numbers to warrant such action. The time and place of establishment shall be determined by Spanish and United States authorities. The branch offices shall operate in coordination with the Mixed Commission on Jurisdiction in Madrid and shall be guided by the same principles and procedures as those established for the Mixed Commission on Jurisdiction in the Madrid area.

7. Whenever a member of the United States Forces commits an offense solely against the property of the United States or solely against the property or person of another member of the United States Forces and the offense is committed on a military reservation in an area which is under the control of a United States "Commander," the offender will, if he is apprehended by Spanish military police, immediately be turned over into the custody of United States military authorities for disciplinary action. No report of the offense will be made to the Mixed Commission on Jurisdiction and the United States "Commander's"

disposition of the case shall be final and binding on all concerned. In all other cases of offenses committed on a military reservation, the procedure established in other paragraphs shall apply.

8. a. In those cases where Spanish authorities desire to prosecute a member of the United States Forces in Spanish courts, a request for such jurisdiction, and the reasons therefor, will be made to the Chief, Joint United States Military Group, through the Mixed Commission on Jurisdiction in Madrid, Spain. The Chief, Joint United States Military Group, will give full consideration to any request formulated by the competent Spanish authorities and if he accedes to the request, he or his delegated representative will execute a waiver of jurisdiction which will confer upon Spanish authorities the right to proceed to trial of the individual summoned.

b. The custody of a member of the United States Forces over whom Spanish authorities are to exercise jurisdiction, because of waiver of jurisdiction by United States authorities or because the offense charged is not punishable under the Uniform Code of Military Justice, shall remain with the United States authorities until such time as the trial is concluded and the sentence pronounced. The United States authorities shall accept the responsibility of assuring the presence of the offender at the appointed time of trial.

c. Whenever a member of the United States Forces is prosecuted by the Spanish authorities, he shall be entitled to the same rights and privileges as those enjoyed by Spanish citizens in connection with judicial proceedings. The principal rights to which a member of the United States Forces shall be entitled are:

- (1) Protection against Ex Post Facto law.
- (2) Protection against Bills of Attainder.
- (3) A prompt and speedy trial.
- (4) Be informed, in advance of trial, of the specific charge or charges made against him.
- (5) Have a public trial and be present at his trial.
- (6) Have the burden of proof placed upon the prosecution.
- (7) Be tried by an impartial court.
- (8) Be protected from the use of a confession obtained by illegal or improper means.
- (9) Be confronted with the witnesses against him.
- (10) Have compulsory process for obtaining witnesses in

his favor, if they are within the jurisdiction of the government of Spain.

(11) Have legal representation of his own choice for his defense during trial and pretrial procedures or shall be furnished free legal counsel under the same terms and conditions applicable to Spanish citizens.

(12) If he considers it necessary, to have the services of a competent interpreter.

(13) Have a representative of the United States Forces present at his trial.

9. a. The authorities of the United States and Spain will assist each other in the collection of evidence, conducting investigations and securing the presence of witnesses for investigations and trials. The Mixed Commission on Jurisdiction and representatives of the Joint United States Military Group, Spain, shall confer frequently for the purpose of developing and maintaining a satisfactory method of operation.

b. Spanish nationals and other persons in territory under Spanish jurisdiction, (except members of the United States Forces) who are required to appear as witnesses before United States Military Courts will be paid fees and allowances at rates to be determined by the Chief, Joint United States Military Group in coordination with pertinent Spanish authorities.

c. United States authorities shall advise the Mixed Commission on Jurisdiction of the results of any United States trial in which the accused was an offender against Spanish laws. Spanish authorities shall advise the Chief, Joint United States Military Group of the results of trials in those cases where a member of the United States Forces was prosecuted in Spanish courts.

10. a. Members of the United States Forces shall not be subject to the civil jurisdiction of Spanish courts or authorities for acts or omissions arising out of the performance of their official duties. A certificate from the United States military authorities attesting the status in this regard of a member of the United States Forces shall be considered conclusive by Spanish authority.

b. None of the foregoing procedures shall prejudice the rights of the injured party to indemnification either by following the ordinary Spanish civil procedures or by making an administrative claim for the damages incurred under the applicable laws of the United States. The United States authorities shall adjudicate all claims presented expeditiously. Persons who elect to

undertake a suit in the Spanish civil courts shall thereafter be barred from seeking administrative relief from the United States government for claims arising out of the same act.

MADRID, THE 4TH OF FEBRUARY 1955

FOR THE HIGH
GENERAL STAFF:

/S/
JUAN VIGON
Lieutenant General
The Chief

FOR THE DEPARTMENT
OF DEFENSE OF
THE UNITED STATES
OF AMERICA:

/S/
A. W. KISSNER
Major General
USAF

APPENDIX XXIV

WEST INDIES FEDERATION. AGREEMENT CONCERNING UNITED STATES DEFENCE AREAS

Agreement with the Federation of the West Indies, February 10, 1961, 12 UST & OIA 408, TIAS 4734.

ARTICLE I

DEFINITIONS

In this Agreement, the expression:

“Contractor personnel” means employees of a United States contractor who are not ordinarily resident in the Federation and who are there solely for the purposes of this Agreement;

“Defence area” means an area in respect of which the Government of the United States of America (hereinafter called “the United States Government”) is for the time being entitled to have and enjoy, in accordance with the terms and conditions of this Agreement, the rights, power and authority described in Article II;

“Dependents” means the spouse and children under 21 of a person in relation to whom it is used; and, if they are dependent upon him for their support, the parents and children over 21 of that person;

“Federation” means the Federation of The West Indies;

“Members of the United States Forces” means:

- (a) military members of the United States forces on active duty;
- (b) civilian personnel accompanying the United States Forces and in their employ who are not ordinarily resident in the Federation and who are there solely for the purposes of this Agreement; and
- (c) dependents of the persons described in (a) and (b) above;

“Military purposes” means:

- (a) the installation, construction, maintenance and use of

military equipment and facilities including facilities for the training, accommodation, hospitalisation, recreation, education and welfare of members of the United States Forces; and

- (b) all other activities of the United States Government, United States contractors and authorised service organisations carried out for the purposes of this Agreement;

“Territory” means any Territory of the Federation in which there exists an area which is, or is treated as, a defence area; and “the Territory” means the Territory concerned;

“United States contractor” means any person, body or corporation ordinarily resident in the United States of America that is in the Territory for the purposes of this Agreement by virtue of a contract with the United States Government, and includes a subcontractor;

“United States Forces” means the land, sea and air armed services of the United States, including the Coast Guard.

ARTICLE II

GENERAL DESCRIPTION OF RIGHTS

The United States Government shall have and enjoy, in accordance with the terms and conditions of this Agreement, the rights, power and authority which are necessary for the development, use, operation and protection for military purposes of the defence areas which are described in the Annexes [1] hereto. The United States Government shall have and enjoy such rights of access, rights of way and easements as may be necessary for these purposes.

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ARTICLE IX

CRIMINAL JURISDICTION

- (1) Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within the Territory all criminal and disciplinary jurisdiction conferred on them by United States law over all persons subject to the military law of the United States;

(b) the authorities of the Territory shall have jurisdiction over members of the United States Forces with respect to offences

¹ *Post*, p. 16. (Author's note: The Annexes referred to in this Article are not included in this Appendix).

committed within that Territory and punishable by the law in force there.

(2) (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States with respect to offences, including offences relating to security, punishable by the law of the United States but not by the law in force in the Territory.

(b) The authorities of the Territory shall have the right to exercise exclusive jurisdiction over members of the United States Forces with respect to offences, including offences relating to security, punishable by the law in force in the Territory but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph (3) of this Article, an offence relating to security shall include

(i) treason;

(ii) sabotage, espionage or violation, of any law relating to official secrets or secrets relating to national defence.

(3) In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over a member of the United States Forces in relation to

(i) offences solely against the property or security of the United States or offences solely against the person or property of another member of the United States Forces;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the Territory shall have the primary right to exercise jurisdiction.

(c) If the authorities having the primary right decide not to exercise jurisdiction they shall notify the other authorities as soon as practicable. The United States authorities shall give sympathetic consideration to a request from the authorities of the Territory for a waiver of their primary right in cases where the authorities of the Territory consider such waiver to be of particular importance. The authorities of the Territory will waive, upon request, their primary right to exercise jurisdiction under this Article, except where they in their discretion determine and notify the United States authorities that it is of particular importance that such jurisdiction be not waived.

(4) The foregoing provisions of this Article shall not imply any right for the military authorities of the United States to exercise jurisdiction over persons who belong to, or are ordinarily resident in, the Federation unless they are military members of the United States Forces.

(5) (a) To the extent authorised by law, the authorities of the Territory and the military authorities of the United States shall assist each other in the service of process and in the arrest of members of the United States Forces in the Territory and in handing them over to the authorities which are to exercise jurisdiction in accordance with the provisions of this Article.

(b) The authorities of the Territory shall notify promptly the military authorities of the United States of the arrest of any member of the United States Forces.

(c) Unless otherwise agreed, the custody of an accused member of the United States Forces over whom the authorities of a Territory are to exercise jurisdiction shall, if he is in the hands of the United States authorities, remain with the United States authorities until he is charged. In cases where the United States authorities may have the responsibility for custody pending the completion of judicial proceedings, the United States authorities shall, upon request, make such a person immediately available to the authorities of the Territory for purposes of investigation and trial and shall give full consideration to any special views of such authorities as to the way in which custody should be maintained.

(6) (a) To the extent authorised by law, the authorities of the Territory and of the United States shall assist each other in the carrying out of all necessary investigations into offences, in providing for the attendance of witnesses and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authorities delivering them.

(b) The authorities of the Territory and of the United States shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

(7) A death sentence shall not be carried out in any Territory by the military authorities of the United States if the legislation of that Territory does not provide for such punishment in a similar case.

(8) Where an accused has been tried in accordance with the provisions of this Article and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the Federation. Nothing in this paragraph shall, however, prevent the military authorities of the United States from trying a military member of the United States Forces for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of a Territory.

(9) Whenever a member of the United States Forces is prosecuted by the authorities of a Territory he shall be entitled—

- (a) to a prompt and speedy trial;
- (b) to be informed in advance of trial of the specific charge or charges made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour if they are within the jurisdiction of the Territory;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the Territory;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the United States and, when the rules of the court permit, to have such a representative present at his trial which shall be public except when the court decrees otherwise in accordance with the law in force in the Territory.

(10) Where a member of the United States Forces is tried by the military authorities of the United States for an offence committed outside a defence area or involving a person, or the property of a person, other than a member of the United States Forces, the aggrieved party and representatives of the Territory and of the aggrieved party may attend the trial proceedings except where this would be inconsistent with the rules of the court.

(11) A certificate of the appropriate United States commanding officer that an offence arose out of an act or omission done in the performance of official duty shall be conclusive, but the commanding officer shall give consideration to any representation made by the Government of the Territory.

(12) Regularly constituted military units or formations of the

United States Forces shall have the right to police the defence areas. The military police of the United States Forces may take all appropriate measures to ensure the maintenance of order and security within such defence areas.

(13) In this Article, a reference to the authorities of a Territory includes, where appropriate, the authorities of the Federation.

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APPENDIX XXV

AUSTRALIA. AGREEMENT CONCERNING THE STATUS OF UNITED STATES FORCES IN AUSTRALIA

Agreement between the United States and Australia. May 9, 1963. TIAS 5349.

ARTICLE 1

In this Agreement, except where the contrary intention appears:

“Australia” includes the territories under the authority of the Commonwealth of Australia;

“members of the United States Forces” means personnel belonging to the land, sea or air armed services of the United States in Australia in connection with activities agreed upon by the two Governments, other than those for whom status is provided otherwise than under this Agreement;

“members of the civilian component” means civilian personnel in Australia in connection with activities agreed upon by the two Governments who are neither nationals of, nor ordinarily resident in, Australia, but who are:

(a) employed by the United States Forces or by military sales exchanges, commissaries, officers’ clubs, enlisted men’s clubs or other facilities established for the benefit or welfare of United States personnel and officially recognised by the United States authorities as nonappropriated fund activities; or

(b) serving with an organisation which, with the approval of the Australian Government, is accompanying the United States Forces;

“dependant” means a person in Australia who is the spouse of, or other relative who depends for support upon, a member of the United States Forces or of the civilian component.

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ARTICLE 8

(1) Subject to the provisions of this Article:

- (a) the military authorities of the United States shall have the right to exercise within Australia all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;
- (b) the authorities of Australia shall have jurisdiction over members of the United States Forces and of the civilian component and dependants with respect to offences committed within Australia and punishable by the law of Australia.

(2) (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over persons subject to the military law of the United States which respect to offences, including offences relating to its security, punishable by the law of the United States, but not by the law of Australia.

(b) The authorities of Australia shall have the right to exercise exclusive jurisdiction over members of the United States Forces and of the civilian component and dependants with respect to offences, including offences relating to the security of Australia, punishable by the law of Australia but not by the law of the United States.

(c) For the purposes of this paragraph and paragraph (3) of this Article, an offence relating to the security of a State shall include:

- (i) treason against the State;
- (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

(3) In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

- (a) The military authorities of the United States shall have the primary right to exercise jurisdiction over persons subject to the military law of the United States in relation to:
 - (i) offences solely against the property or security of the United States, or offences solely against the person or property of a member of the United States Forces, the civilian component or a dependant;

- (ii) offences arising out of any act or omission done in the performance of official duty.
 - (b) In the case of any other offence the authorities of Australia shall have the primary right to exercise jurisdiction.
 - (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
- (4) The foregoing provisions of this Article shall not confer on the military authorities of the United States any right to exercise jurisdiction over persons who are nationals of or ordinarily resident in Australia unless they are members of the United States Forces.
- (5) (a) The military authorities of the United States and the authorities of Australia shall assist each other in accordance with arrangements to be agreed to by them in the arrest of members of the United States Forces or of the civilian component or of dependants in Australia and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.
- (b) The authorities of Australia shall notify promptly the military authorities of the United States of the arrest of any member of the United States Forces or of the civilian component or of a dependant.
- (c) The custody of an accused member of the United States Forces or of the civilian component or of a dependent over whom Australia is to exercise jurisdiction shall, if he is in the hands of the United States authorities, remain with the United States to the extent authorised by United States law until he is charged by Australia.
- (6) (a) The military authorities of the United States and the authorities of Australia shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure of and, in proper cases, the handing over of objects in connection with an offence. The handing over of such objects may, however, be made subject

to their return within any reasonable time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Australia shall notify each other of the disposal of all cases in which there are concurrent rights to exercise jurisdiction.

(7) (a) A death sentence shall not be carried out in Australia by the military authorities of the United States.

(b) The authorities of Australia shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the United States under the provisions of this Article within Australia.

(8) Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or by the authorities of Australia and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned or has had sentence suspended, he may not be tried again for the same offence within Australia. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of the United States Forces for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of Australia.

(9) Whenever a member of the United States Forces or of the civilian component or a dependant is prosecuted under the jurisdiction of Australia he shall be entitled:

- (a) to a prompt and speedy trial;
- (b) to be informed, in advance of trial, of the specific charge or charges to be made against him;
- (c) to be confronted with the witnesses against him;
- (d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of Australia;
- (e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the part of Australia in which he is being prosecuted;
- (f) if he considers it necessary, to have the services of a competent interpreter; and
- (g) to communicate with a representative of the United

States Government and, when the rules of the court permit, to have such a representative at his trial.

* * * * *

ARTICLE 20

(1) Regularly constituted military units or formations of the United States Forces shall have the right to police any camps, establishments or other premises or areas of which the United States Forces have exclusive occupation as the result of arrangement with the Australian Government. United States military police may take all appropriate measures to ensure the maintenance of order and security in such premises or areas.

(2) Outside such premises and areas, United States military police will be employed only subject to arrangements with the appropriate Australian authorities and in liaison with such appropriate Australian authorities and in so far as such employment:

- (a) is appropriate to provide for the protection of United States installations in premises or areas of which the United States Forces have the use, but not exclusive occupation; or
- (b) is necessary to maintain discipline and order among the members of the United States Forces and to ensure their security.

(3) The United States Government may, after appropriate consultation in any case between the relevant authorities of the two Governments, designate areas comprising buildings or portions of buildings or installations in premises or areas of which the United States Forces have use or occupation to be areas into which only personnel authorised by the local United States Commander may enter. The United States Forces will be responsible for the internal security of areas so designated.

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